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In The

Supreme Court of the United States

October Term, 1995

AKHTAR HAMID, SHRICHAND CHAWLA, SOHA, INC., IDRISS DEVCO, INC., S&L GENTRADE, INC., LEO D. CURRAN, NIAM MUSLEH, WILLY HERMANS, RED CIRCLE INVESTMENTS, LTD., SADIK MAHMOUD HASHIM, NUHA HUSSAIN MUBAREK, JALEH KHORASSANCHY, PHILIP MERZ and AMIT PANDYA, On Behalf Of Themselves and All Others Similarly Situated,

Petitioners,

vs.

PRICE WATERHOUSE; PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM, LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION; BANKAMERICA CORP.; BANK OF AMERICA NT&SA; HILL & KNOWLTON; GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; FIRST AMERICAN CORP.; FIRST AMERICAN BANKSHARES; PAUL ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN, CLARK CLIFFORD and CLIFFORD & WARNKE,

Respondents.

Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI
APPENDIX VOLUME I (PAGES A-1 TO A-62)

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QUESTIONS PRESENTED

1. Whether Petitioners, including U.S. citizens and residents, who were induced by fraud to deposit their money in a criminal enterprise, the notorious Bank of Credit & Commerce International ("BCCI" or the "Bank"), which was shut down by regulators in July 1991, lack standing to sue those who induced them to deposit their funds in the Bank through false and misleading representations concerning BCCI's legitimacy, solvency and success because their claims are "derivative" and, therefore, belong to the Bank – the criminal enterprise that defrauded them.

2. Whether Petitioners' allegation that they have suffered injury to their business or property by the loss of at least 75% of their money by reason of defendants' pattern of racketeering activity is sufficient to give them standing to bring civil claims pursuant to § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), under this Court's decision in *National Organization for Women, Inc. v. Scheidler*, ___ U.S. ___, 114 S. Ct. 798 (1994).

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants in the court below, are Akhtar Hamid, Shrichand Chawla, Soha, Inc., Idriss Devco, Inc., S&L Gentrade, Inc., Leo D. Curran, Niam Musleh, Willy Hermans, Red Circle Investments, Ltd., Sadik Mahmoud Hashim, Nuha Hussain Mubarek, Jaleh Khorassanchy, Philip Merz and Amit Pandya. Pursuant to Rule 29.1, Petitioners hereby certify that there are no parent companies or subsidiaries of these corporations.

Respondents, who were defendants-appellees in the court below, are Price Waterhouse, Price Waterhouse/U.K., Price Waterhouse World Firm, Ltd., Price Waterhouse/U.S., Ernst & Young, Abu Dhabi, Emirate of Abu Dhabi, Abu Dhabi Investment Authority, Bank of America Corporation, BankAmerica Corporation, Bank of America NT&SA, Hill & Knowlton, GRP Investments, Interredec, Inc., Interredec Southern Company, First American Corporation, First American Bankshares, Paul Adams, Jack Beddow, A. Vincent Scoffone, T. Bertram Lance, Independence Bank, Manuel Noriega, Fulvio Dobrich, Robert Altman, Clark Clifford and Clifford & Warnke.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that affirmed the district court's dismissal of this action. Petitioners' claims, which are brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), were dismissed on the ground that they lack standing to recover their money because their claims are "derivative" and belong to the principal wrongdoer in the scheme to defraud them.

Petitioners, who deposited nearly $4 million in the Bank of Credit & Commerce International ("BCCI" or the "Bank"),[1] include U.S. citizens and residents who are victims of the largest transnational financial institution fraud committed by the most notorious international criminal enterprise in history. Their Complaint alleges that the BCCI criminal enterprise, which falsely posed as a law-abiding, legitimate, solvent and prudent bank, fraudulently obtained their money (deposits), thereby enabling the Bank's insiders and controlling shareholders to misappropriate those funds and/or use them to finance criminal activities worldwide. Petitioners allege

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[1] "BCCI" or the "Bank" include Bank of Credit & Commerce International, S.A.; BCCI Holdings (Luxembourg), S.A.; Bank of Credit & Commerce International Holdings (Luxembourg), S.A.; Bank of Credit & Commerce International (Overseas) Limited; International Credit & Investment Company (Overseas) Limited; International Credit & Investment Company Holdings; and Credit & Commerce American Investment, B.V. BCCI was a group of banks and corporations located in various countries under common ownership and control and founded by defendants Agha Hasan Abedi ("Abedi"), Swaleh Naqvi ("Naqvi"), BankAmerica Corp. and Sheikh Zayed al-Nahayan in 1972. When it was shut down in July 1991, BCCI was an international banking operation with 400 branches located in over 70 countries and was the fifth largest private bank in the world. A-65 to A-69, A-132 to A-135.

that they were the targets and direct victims of the fraudulent scheme and were damaged because they lost at least 75% of their deposits. Petitioners sued the wrongdoers – BCCI's officers, directors and controlling shareholders, as well as the Bank's lawyers and accountants and other persons and entities who participated in the criminal enterprise – under § 1964(c) of RICO seeking to recover their losses.

BCCI and many of its operatives have been indicted and/or convicted of crimes (including RICO violations) in the U.S. yet Petitioners, the depositors whose monies were obtained through the criminal enterprise's fraudulent scheme, had their claims dismissed on a Rule 12(b)(6) motion to dismiss, supposedly because they lacked standing to assert a civil RICO claim that was *based on the same conduct that had resulted in those criminal RICO convictions and indictments*. The court below reasoned that Petitioners' claims belonged to the Bank that had defrauded them, so that only BCCI could pursue an action against the other wrongdoers and it held that Petitioners, who lost their money in the largest criminal fraud in history, suffered no injury to their business or property sufficient to give them standing to sue under § 1964(c) of RICO. A-15 to A-21.

This Petition should be granted because (1) this case presents important questions of law about the ability of U.S. citizens and residents to combat transnational schemes to defraud utilizing the civil remedies which Congress expressly provided in RICO; (2) the decision of the court below conflicts with *National Organization for Women, Inc. v. Scheidler*, ___ U.S. ___, 114 S. Ct. 798 (1994) ("*NOW*"), which established what allegations of injury to business or property confer RICO standing in a private action; and (3) it conflicts with reported decisions from the Second, Third, Fourth, Fifth and Seventh Circuits holding that intended victims and targets of schemes to defraud like the depositors here have standing to bring RICO claims against the perpetrators.

OPINIONS BELOW

The Ninth Circuit's opinion, *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir.), *rehearing denied*, No. 92-56085 (9th Cir. Aug. 16, 1995), is reproduced in the Appendix. *See* A-1 to A-22. The district court's opinion, *In re Bank of Credit & Commerce Int'l Depositors Litig.*, MDL Docket No. 908, 15 RICO L. Rptr. 1234 (C.D. Cal. May 20, 1992), is also reproduced therein. *See* A-24 to A-62.[2]

BASIS FOR JURISDICTION

The Ninth Circuit's opinion was issued on April 7, 1995. A-1. The petition for rehearing *en banc* filed by Petitioners was denied on August 16, 1995. A-23. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 1964(c) of RICO provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

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[2] Also reproduced in the Appendix are pertinent excerpts from Petitioners' 482-page Third Amended Complaint for Violations of the Racketeer Influenced and Corrupt Organizations Act, International Financial and Banking Corruption and Outlawing ("Complaint"), which was filed in the district court on January 30, 1992. *See* A-63 to A-338.

STATEMENT OF THE CASE

A. The Allegations Of The Complaint

This is a RICO action brought by Petitioners, who include U.S. citizens and residents,[3] who are victims of the constellation of banks known as BCCI, the largest criminal enterprise in history. Petitioners sued on their own behalf seeking to recover lost deposits totaling $4 million and also sought to represent a class of nearly one million defrauded depositors who were induced to place their money in the Bank, where it was used to finance illegal transactions, siphoned off to BCCI insiders and

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[3] As detailed in the Complaint, Akhtar Hamid is a U.S. citizen and California resident who deposited $140,000 in a BCCI Bank in London; Shrichand Chawla is an Indian citizen and California resident who deposited $600,000 in a BCCI Bank in Hong Kong; Soha, Inc. is an Oregon corporation resident in California which deposited $125,000 in BCCI's Los Angeles agency; Idriss Devco, Inc., a California corporation resident in that state, and S&L Gentrade, Inc., an offshore corporation incorporated in the U.K., deposited $2 million in BCCI's Los Angeles agency; Philip Merz is a U.S. citizen and Pennsylvania resident who deposited $52,000 in a BCCI Bank in Luxembourg; Amit Pandya is a U.S. citizen and Washington, D.C., resident who deposited 30,000 British pounds in a BCCI Bank in London; Leo D. Curran is a U.S. citizen and Pennsylvania resident who deposited $41,000 in a BCCI Bank in Luxembourg; Niam Musleh is an Abu Dhabi citizen who deposited $10,000 in a BCCI Bank in Abu Dhabi; Willy Hermans is a citizen of the Netherlands and a resident of the Cayman Islands who deposited $74,000 in a BCCI Bank in Grand Cayman; Red Circle Investments, Ltd. is a Grand Cayman corporation which deposited over $687,000 in a BCCI Bank in Grand Cayman; Sadik Mahmoud Hashim and Nuha Hussain Mubarek, husband and wife, are Iraqi citizens and permanent Canadian residents who deposited $65,000 in a BCCI Bank in London; and Jaleh Khorassanchy is a French and Iranian citizen and California resident who deposited 12,000 British pounds, 37,000 Deutsche marks and $3,000 dollars in a BCCI Bank in Paris. *See* A-115 to A-132.

affiliates and lost forever when the Bank was seized by U.S. (and foreign) bank regulators. Because of defendants' fraudulent scheme, depositors have been denied *any* access to their funds since July 1991. BCCI petitioned U.S. bankruptcy courts for protection and it was found by a U.K. court to be "plainly and hopelessly insolvent" and ordered liquidated in Luxembourg. A-115. Because BCCI was deliberately headquartered by its founders in "secrecy" jurisdictions where deposit insurance is virtually non-existent, the Complaint alleges that Petitioners will *never* recover more than 25% of their deposits. A-65 to A-67, A-113 to A-132.[4]

Petitioners' Complaint alleges that BCCI misrepresented its financial condition and operations in financial statements which overstated its assets, capital and profitability, thereby obtaining billions in deposits from customers, including U.S. citizens and residents. Petitioners were induced to deposit their funds by false and misleading representations concerning BCCI's legitimacy, solvency and success. Once deposited in the Bank, their funds were improperly used by BCCI and defendants to make illegal transfers to the Bank's insiders and their business associates and finance the concealment, continuance and extension of the BCCI criminal enterprise (thus continuing the flow of deposits into the Bank) through bribery and deceit of public officials and regulators to facilitate or cover-up illegal infiltration of the U.S. banking system. As detailed in the Complaint (whose allegations were supported by over 2,000 pages of exhibits and

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[4] BCCI and many of its officers and their co-conspirators were indicted on federal and state charges, including RICO, and many pled guilty. BCCI pled guilty in 1990 and 1991 to state and federal criminal charges (including RICO) arising from its illegal conduct in the U.S. As part of its RICO guilty plea, BCCI forfeited over $550 million in assets located here. A-111 to A-113; *see also United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1188 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2613 (1995).

appendices filed in the district court),[5] defendants' RICO predicate acts included bribery, mail, wire, bank and securities fraud, dealing in narcotic drugs, obstruction of justice, and monetary transactions in property from illegal activity, all designed to create the false image that BCCI was sound, profitable and legitimate. A-65 to A-111, A-189 to A-214, A-247 to A-277.

The BCCI criminal enterprise had a direct and substantial impact in the U.S., where the Bank (1) solicited and obtained millions in deposits from U.S. citizens and residents (and others) through offices located in several cities (including, *inter alia*, Los Angeles, San Francisco and Beverly Hills, California; Miami, Boca Raton and Tampa, Florida; Houston, Texas; Chicago, Illinois; New York City; and Washington, D.C.), and (2) illegally infiltrated the U.S. banking system by secretly obtaining control of First American Bankshares, Inc. ("First American"), a bank holding company which operated banks with over 400 branches in six states; the National Bank of Georgia ("NBG"), the state's largest bank; CenTrust Savings Bank ("CenTrust") in Florida, which controlled some 20 branches; Independence Bank (which had 11 branches); and Viking Savings in California. A-65 to A-69.

BCCI was founded in 1972 by establishing separate entities in "secrecy" jurisdictions (the Cayman Islands

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[5] These documents included several defendants' federal and state criminal indictments and guilty pleas, as well as government investigative reports, enforcement proceedings and forfeiture orders detailing the fraudulent scheme, including the two-volume U.S. Senate investigative report issued on Sept. 30, 1992 entitled *The BCCI Affair: A Report to the Senate Committee on Foreign Relations* prepared by the Subcommittee on Terrorism, Narcotics and International Operations (the "Kerry Report"), and the Sept. 1992 report of the General Accounting Office entitled *Foreign Bank – Initial Assessment of Certain BCCI Activities in the U.S.* (the "GAO Report").

and Luxembourg) with notoriously lax banking regulations and supervision. This allowed BCCI to avoid having a single outside auditor examine all of the Bank's subsidiaries or review many key records, thus avoiding comprehensive governmental regulation or any effective overall audit of BCCI. A-71 to A-73.[6] The Bank and defendants also filed false statements (including financial statements) with U.S. regulators and other banking authorities. With the help of its accountants, BCCI consistently reported false profits and capital and, even after losses were first disclosed in the late 1980's, continued to report a strong financial condition. A-74 to A-75, A-214 to A-241. In 1985, BCCI represented that it was

> adequately supported by a capital fund in excess of $1 billion. . . . [Its] results show a total shift of emphasis from growth to consolidation, from quantity to quality – an emphasis on high capital/asset ratio, high liquidity, high quality of assets. . . . *The focus will continue to accentuate on conservatism and prudence during the next decade.*

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[6] As the GAO report stated:

> Although national banking supervisors could supervise most BCCI operations within their geographic areas, none had the responsibility or authority to examine BCCI's worldwide activities. *The corporate structure established by BCCI thus had the effect of minimizing close supervision of the full range of its operations and apparently enabled it to avoid detection of its activities and true condition for almost 2 decades.* For example, BCCI could remove transactions from the accounts of one subsidiary at selected times and place them on the accounts of BCCI units in the countries, thereby shielding these activities from supervisory review and external audit.

GAO Report at 3. (Here, as elsewhere, emphasis has been added unless indicated otherwise.)

A-83; *see also* A-214 to A-218. In 1988, BCCI represented that its *"success so far is due to the honesty and integrity of purpose of the entire staff,"* that the Bank's policy *"is always to follow scrupulously all the laws of each country where we do business"* and that BCCI tried to avoid doing business with *"firms or individuals of questionable background."* A-83.

In its annual reports, BCCI "thank[ed] the Central Banks and Supervisory Agencies in countries where the Group Banks are operating for the valuable guidance extended to them," and represented that BCCI's *"balance sheet reflects our management policies to maintain prudent ratios and a high level of liquidity. Special attention is also being paid to the quality and diversification, geographically and industry-wise, of the group's loan portfolio."* A-220, A-221. In 1988, BCCI described its business in glowing terms, stating that "our principal activities will be in the area of commercial banking" and that "our business policies will be based on . . . [h]igh liquidity to be maintained through broad based and diversified customer deposits," high quality assets and "[q]uality profit generated both from sustainable and regular streams and through short term transactions and deals." A-227 to A-228. Petitioners reasonably believed (and relied upon) these statements and, as noted above, deposited $4 million in the Bank. A-115 to A-132; *see also* A-189 to A-214.

Even after BCCI's first U.S. criminal indictment in 1988 and its reported losses, the Bank still provided strong reassurances to its depositors:

> [W]e are able to report the major support given by the Government of Abu Dhabi. . . . [T]hey subscribed $400 million in new capital – largely eliminating the negative impact on the Capital Funds position of the Group . . . , thus providing an increasingly solid and sound foundation. . . . [e]nhanced efforts to maintain high liquidity result[ing] in an increase in liquid assets from $9.8 billion to $12.4 billion during the year. . . . [and the] investment portfolio totalling $1.812

> million . . . , [which] continues to consist primarily of US Treasury stock. . . . With the support of our new shareholders we are confident that a bright future awaits the Group.

A-233, A-234, A-236. In April 1990, when the Bank was on the verge of collapse, it made the situation appear positive, stating that Abu Dhabi's injection of new capital *"gives the necessary strength to the [BCCI] Group to support its future performance and development,"* that BCCI was operating *"very normally,"* that the Bank of England was *"fully in the picture"* and there was no real ground for concern by depositors. A-87, A-88, A-229 to A-232. One year later, the Bank was in ashes.

In June 1991, after being ordered by the Bank of England to report BCCI's true financial condition, defendant Price Waterhouse admitted that there were over $600 million in unrecorded deposits in the Bank and that:

> [T]he accounting records and financial position of the [BCCI] Group have been falsified in relation to the above transactions for a substantial number of years [and] these transactions represent only a part of a wholesale deception to misrepresent and falsify the financial position of [BCCI] over the last decade through a series of complicated manipulations [including] a significant falsification of the accounting records (involving false loans, transactions, and confirmations) on such a scale that the true financial history of BCCI is unlikely to be able to be recreated. . . .

A-89. Price Waterhouse admitted that *"it would appear that the bank has generated significant losses over the last decade and may never have been profitable in its entire history." Id.* Within days, regulators seized BCCI, having discovered its illegal infiltration of the U.S. banking system, falsification of its financial condition, financing illegal drug and arms transactions, laundering drug money and undisclosed insider "lending" transactions. A-69 to A-73, A-89.

In July 1991, BCCI and certain of its officers and directors were indicted in New York on charges that they operated BCCI as a criminal enterprise, while the Federal Reserve Board announced it would bar defendants Ghaith Pharaon, Abedi, Kemal Shoaib and Naqvi from engaging in U.S. banking activities and stated it would fine BCCI $200 million for lying to regulators to conceal the illegal infiltration of the U.S. banking system. In September 1991, the Department of Justice identified BCCI as a "criminal enterprise" and charged the Bank's treasurers during 1980-1991 (defendants Syed Ziauddin Uddin Ali Akbar and Dildar Rizvi) with allowing BCCI's U.S. offices to launder money from the illegal narcotics smuggled into this country. In November 1991, BCCI and several of its officers were indicted for illegal acquisition and control of First American, CenTrust and Independence Bank. A-69 to A-71. Other indictments, guilty pleas, forfeiture orders, enforcement proceedings, government investigations and attendant revelations followed as the stain of this worldwide financial scandal spread to unprecedented proportions.

New York County District Attorney Robert M. Morgenthau condemned BCCI as *"the largest bank fraud in world financial history."*[7] It has been publicly reported that:

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[7] A-109. In announcing New York State's indictment of BCCI and its top officers for stealing depositors' money in the U.S., prosecutor Morgenthau stated:

> *This indictment spells out the largest bank fraud in world financial history,*. . . . BCCI was operated as a corrupt criminal organization throughout its entire 19 year history. It systematically falsified its records. . . . And it paid bribes and kickbacks to public officials.
>
> * * *
>
> *By means of this scheme, the defendants obtained more than $20 billion from its depositors, including citizens and foreign nationals in New York City [and] banks headquartered in Manhattan. . . . The best estimates*

> Nothing in the history of modern financial scandals rivals the unfolding saga of [BCCI], the $20 billion rogue empire. . . . Never has a single scandal involved so much money, so many nations or so many prominent people. . . . [I]t is the largest corporate criminal enterprise ever, the biggest Ponzi scheme, the most pervasive money-laundering operation and financial supermarket ever created for the likes of Manuel Noriega, Ferdinand Marcos, Saddam Hussein and the Colombian drug barons.

A-111.[8] This case involves international organized crime on an unprecedented scale and, in January 1992, BCCI

> *indicate at this time that upwards of $5 billion has been lost through this fraud.*
>
> * * *
>
> The corporate structure of BCCI was set up to evade international and national banking laws so that its corrupt practices would be unsupervised and remain undiscovered. . . . The defendants systematically falsified the capital structure of BCCI to make it appear as though it was a solvent, profitable bank secured by the backing of wealthy businessmen from the Middle East.
>
> In fact, *much of the bank's capitalization and assets were fictitious. . . . The defendants . . . defrauded their thousands of depositors, both small and large, who relied on that appearance of respectability.*
>
> *This largest of Ponzi schemes is over.*

A-109 to A-111.

[8] The Kerry Report stated that "BCCI was not a bank which made an adequate return on investment through lending out depositors funds like other banks"; rather, "BCCI was instead an international criminal enterprise and Ponzi scheme, which used new depositors' funds to pay current expenses and to repay earlier depositors, creating a pyramid of mounting obligations that ultimately and inevitably would bring about BCCI's collapse." Kerry Report at 66.

pled guilty to a superseding federal indictment which identified it as a RICO criminal enterprise, admitting a wide range of illegal conduct, including fraudulently and secretly acquiring direct or indirect ownership and control over First American and Independence Bank.

B. The Scheme To Defraud BCCI's Depositors

Petitioners' Complaint alleges that defendants participated in a complex scheme to mislead bank regulators and defraud depositors. A-189 to A-214.[9] The district

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[9] As the district court described (albeit in truncated form) defendants' multi-faceted scheme to defraud BCCI's depositors:

> The facts alleged in [Petitioners'] Complaint fall into three categories: (1) BCCI's involvement in various criminal activities; (2) regulatory violations stemming from BCCI's secret ownership and control of several [U.S.] financial institutions; and (3) *the worldwide fraud perpetrated upon depositors, which ultimately ended in the financial collapse of BCCI. . . . [Petitioners] allege that the defendants' violations of RICO caused them to lose their deposits as follows*:
>
> (a) *[Petitioners] were defrauded into placing their deposits into a criminal enterprise instead of a legitimate bank because BCCI falsely represented that it had substantial assets, profitability, a lawful operation and would be able to honor depositors' claims;*
>
> (b) the ongoing existence of BCCI's criminal enterprise would not have been possible had the defendants not helped BCCI to continue to operate;
>
> (c) *as a continuing operation, BCCI continued to accept [Petitioners'] deposits;* and
>
> (d) because of defendants' racketeering acts (which continued the operation of BCCI), banking regulators seized BCCI on July 5, 1991, freezing [Petitioners'] funds and causing their present losses.

A-30 to A-31 (footnotes and citations omitted); *see also* A-277 to A-338 (describing causal relationship between defendants' violations of § 1962(c)-(d) of RICO, 18 U.S.C. § 1962(c)-(d), and Petitioners' injury).

court sustained Petitioners' allegations of wrongdoing against *each* defendant, stating that "many of plaintiffs' allegations clearly and painstakingly detail defendants' involvement with BCCI." A-33.[10] The Complaint details Petitioners' standing to sue for injuries sustained by reason of defendants' wrongdoing, alleging that their multi-million dollar injuries are separate from *any* injury suffered *by BCCI*, are not incidental thereto and that Petitioners sustained *direct* injury. A-65 to A-67, A-113 to A-115. Petitioners allege that BCCI and the defendants engaged in criminal conduct which benefitted each of them while harming the fraudulent scheme's *targeted* or *intended* victims, who were defrauded into depositing their monies in (and leaving their funds on deposit with) the Bank as a result of, *inter alia*, BCCI's false financial statements and filings with government regulators, which enabled the enterprise to continue to operate and misrepresent itself as a well-capitalized, safe, conservatively managed institution when, in fact, it was a criminal enterprise operating a Ponzi scheme. After regulators seized BCCI and Petitioners lost access to their deposits, the Bank was found to be "plainly and hopelessly insolvent" and ordered liquidated; as a result, Petitioners have lost at least 75% of their deposits. A-113 to A-115.

C. Proceedings In The Courts Below

Notwithstanding such detailed allegations, the Ninth Circuit affirmed the district court's dismissal of Petitioners' RICO claims based on the conclusion that they

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[10] *See also* A-65 to A-113 (summary of Complaint); A-136 to A-189 (identification of defendants and description of each one's participation in the BCCI criminal enterprise); A-189 to A-214 (description of scheme to steal Petitioners' deposits and each defendant's participation in the BCCI criminal enterprise); A-214 to A-241 (identification and description of BCCI's false financial statements and reports); and A-241 to A-277 (description of defendants' RICO predicate acts).

lacked *standing* to sue the defendants. A-15 to A-21.[11] Ignoring (or misreading) the pertinent allegations of the Complaint, the court below mischaracterized Petitioners' injuries as "indirect," A-17, as if BCCI (the criminal enterprise) was the innocent victim of defendants' fraudulent scheme. It was not. Even so, the Ninth Circuit acknowledged that defendants' wrongful acts *caused* Petitioners' injuries:

> As depositors, [Petitioners] are creditors of BCCI. They allegedly loaned money to BCCI which, because of the various wrongs by defendants, it was unable to pay back. *To the extent that the alleged wrongs reduced the ability of the bank to pay its debts, or caused it to be in business for a longer time than it should have been so that it could continue to borrow money from depositors fooled about its true condition, the wrongs would have had the practical consequence of harming [Petitioners].*

A-16 to A-17 (citations omitted).

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[11] In its opinion, the court below repeatedly stressed that BCCI was not named as a defendant in the Complaint, as if this point had any significance given BCCI's undisputed insolvency. *See, e.g.*, A-4 ("Appellants claim to represent depositors of funds in what they call 'the constellation of banks known as [BCCI].' They do not sue the 'constellation of banks.' They sue seventy-seven people, firms, and a foreign country."). The court below overlooked the Complaint's specific allegations that "[i]n July, 1991, the BCCI Banks filed for bankruptcy in the United States District Court for the Southern District of New York" and "[w]ere it not for the injunction entered by that court against the filing or prosecution of suits against BCCI," it "would be named as a defendant." A-133. The fact that Petitioners chose not to name one of the wrongdoers as a defendant, precisely because it was insolvent, is legally irrelevant to the validity of Petitioners' RICO claims. *Cf. U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1251 (10th Cir. 1988).

Incorrectly relying on *Popkin v. Jacoby (In re Sunrise Sec. Litig.)*, 916 F.2d 874, 880-83 (3d Cir. 1990) (*"Sunrise"*), the court below inexplicably stated that Petitioners "should be treated the same as shareholders in a corporation," A-18, concluding that "the[ir] RICO claim is derivative and there is no standing on the part of the shareholders or depositors to assert it." *Id.* In other words, according to the Ninth Circuit, Petitioners' claims belong to BCCI, the very Bank that defrauded them. This analysis is outrageous and compels reversal.

Ignoring subsequent Third Circuit decisions limiting *Sunrise* to its unusual facts, as well as Second, Third, Fourth, Fifth and Seventh Circuit cases recognizing the RICO standing of defrauded creditors under these circumstances, the court below justified dismissal of Petitioners' claims by stating that "allowing the derivative suit would lead to double counting of damages and would interfere with an equitable liquidation" of BCCI's assets in Luxembourg, A-19 to A-20, adding insult to the multi-million dollar injuries already sustained by Petitioners by unjustifiably terming this lawsuit an "attempt to jump in line ahead of other creditors," A-21.

REASONS FOR GRANTING THE WRIT

This case arises out of "the largest case of organized crime in history."[12] This Petition presents critical issues

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[12] Kerry Report at 64. The Kerry Report concluded, *inter alia*, that (1) BCCI constituted *"international financial crime on a massive and global scale"*; (2) "systematically bribed world leaders and political figures throughout the world"; (3) developed "a strategy to infiltrate the U.S. banking system, which it successfully implemented, despite regulatory barriers that we designed to keep it out"; and (4) that the Bank's accountants *"failed to protect BCCI's innocent depositors and creditors from the consequences of poor practices at the Bank of which the auditors were aware for years."* Kerry Report at 10, 11 and 14. Accordingly, in its legislative and policy recommendations, the Kerry Report

concerning the standing of U.S. citizens and residents to maintain civil enforcement actions under RICO, which was designed to combat fraud and organized crime in every form. The Ninth Circuit's decision ignores *NOW*, 114 S. Ct. at 803, which established how the requisite injury to business or property must be pled to state a claim under § 1964(c) of RICO, as well as reported decisions from the Second, Third, Fourth, Fifth and Seventh Circuits holding that the intended victims of fraudulent schemes (here, bank depositors) have standing to bring RICO claims against the perpetrators.

Review by this Court is necessary not only to correct an injustice to Petitioners, who include U.S. citizens and residents, but also to avoid a precedent that will create a gaping loophole in the ability of *all* U.S. citizens to protect themselves from or remedy injuries caused by offshore financial fraud. If uncorrected, the decision of the court below means that financial criminals can operate from offshore secrecy jurisdictions with impunity.[13] The Ninth Circuit's decision means that such modern-day financial pirates can illegally enter and operate in the U.S., defraud U.S. citizens by inducing them to deposit their funds in offshore financial institutions (or their U.S.-

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concluded, *inter alia*, that the U.S. should "develop a more aggressive and coordinated approach to combat international financial crime," emphasizing that BCCI and its insiders "*used foreign bank secrecy and confidentiality laws to commit crimes*, to prevent the detection of those crimes, and to obstruct law enforcement efforts to investigate and prosecute crimes once they were discovered." *Id.* at 25, 776.

[13] According to the Kerry Report, BCCI and defendants carried out their fraudulent scheme by using bank secrecy havens (including Luxembourg and the Cayman Islands) to avoid regulation on a consolidated basis by any single regulator of the Bank, thereby permitting BCCI to transfer assets and liabilities from bank to bank as needed to conceal the Bank's true economic status. Kerry Report at 69-70; *see also* A-67 to A-68.

based agency offices), but then avoid the victims' civil RICO action by claiming that it was the financial institution which was the real victim of their crime and, therefore, the depositors (creditors) have no standing to sue. Thus, the defrauded depositors' *only* remedy will be to accept whatever pittance they receive from some insolvency proceeding conducted in a foreign land, in which they have no convenient way to participate, which will not produce a full recovery of their lost funds and which provides them no civil RICO remedy against the officers and directors of the financial institution, let alone the other participants in the operation of the criminal enterprise.[14]

The Ninth Circuit phrased the issue as, "Can a depositor sue a bank robber?," and answered it no, A-17, but Petitioners did *not* sue someone like a "bank robber," or another wholly unrelated third party who had no prior relationship with either the depositors or the Bank. Rather, Petitioners sued BCCI's officers, directors, accountants and lawyers who made false representations to them that caused Petitioners to deposit money in the

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[14] Even if a financial institution used by criminals as a vehicle to steal money from the public is (in a sense) a "victim" of that criminal conduct and has its own rights which its trustee in bankruptcy (or receiver) can assert against the perpetrators, that does *not* mean that the depositors whose money had to be fraudulently obtained for the criminal enterprise to operate in the first place are not the *primary targets* of the fraud or its *direct victims*. This Court long ago established that a trustee (or receiver) of an insolvent entity does *not* have the ability to assert the claims of the victims of the fraudulent scheme (*i.e.*, the depositors or stockholders who were cheated by the enterprise) when the insiders used it as an instrumentality to cheat the public to obtain their funds as investors (or depositors). *See Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 431-32 (1972).

Bank, or misrepresentations to U.S. regulators that permitted the Bank to continue to operate and, thus, continue to solicit and accept deposits from U.S. citizens and residents.

It cannot be gainsaid that the wrongful conduct detailed in Petitioners' Complaint was sufficient to create *criminal* RICO liability for BCCI (the undisputed RICO enterprise) and its top operatives, but was insufficient to provide Petitioners, the targets and victims of the fraudulent scheme, with sufficient standing to prosecute their *civil* damage claims past the pleading stage. The people whose money was stolen by the criminal enterprise and its insiders were thrown out of court on a standing technicality, even though their Complaint described the fraudulent scheme, identified the criminal enterprise and alleged that Petitioners were the targets and intended victims of the criminal enterprise who have lost at least 75% of their money – even allowing for whatever recovery they may obtain someday through BCCI's overseas reorganization proceedings.

The Ninth Circuit's decision is illogical and irrational. It does violence to RICO's statutory language and intent and it conflicts with this Court's decision in *NOW* and numerous circuit court decisions permitting creditors to use RICO to remedy a fraud that was perpetrated on them through a pattern of racketeering. It leaves U.S. citizens and residents who deposited their monies in a bank that was illegally and fraudulently operating in this country without *any* remedy. If permitted to stand, the Ninth Circuit's decision will also leave U.S. citizens and residents without *any* RICO remedy when they are cheated in the future by an international financial fraud perpetrated by criminals operating offshore in secrecy jurisdictions where deposit insurance is non-existent and regulatory oversight is lax at best. That is wrong. The decision below sets a dangerous precedent and it should be reversed.

ARGUMENT

A. RICO's Statutory Provisions And Liberal Construction Clause Compel Its Application To Combat International Financial Fraud, Including The BCCI Enterprise, And Allow Petitioners To Bring Civil RICO Claims Against The Persons And Entities That Defrauded Them

It is undisputed that BCCI, its insiders and the professionals who participated in the operation of the criminal enterprise engaged in unprecedented global financial and regulatory fraud, as confirmed by the Bank's 1992 guilty plea to *criminal* RICO charges. RICO's express purpose is "the imposition of . . . *new civil sanctions* to provide *new legal remedies* for *all types of organized criminal behavior*, that is, enterprise criminality – from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors."[15] RICO's extraterritorial reach is undisputed,[16] and, given the

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[15] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (footnote and citation omitted). This Court has confirmed that "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (citing *Russello v. United States*, 464 U.S. 16, 26-29 (1983)); *see also United States v. Turkette*, 452 U.S. 576, 591 (1981).

[16] *See, e.g., Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir.) (in an action alleging fraud in securities transactions that occurred partly overseas, subject matter jurisdiction over civil RICO claims upheld because some predicate acts constituting the pattern of racketeering activity occurred within the U.S.), *cert. denied*, 502 U.S. 1005 (1991); *C.A. Westel de Venezuela v. American Tel. & Tel. Co.*, Case No. 90 Civ. 6665 (PKL), 1993 U.S. Dist. LEXIS 16857 (S.D.N.Y. Nov. 30, 1993) (following *Alfadda* in civil RICO action brought by foreign plaintiffs who were injured abroad because at least some predicate acts were committed in the U.S.); *United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla.

Complaint's detailed allegations, no sharp pencil analysis is required to apply it to defendants' fraudulent scheme. No person or entity is immune from RICO's penalties, no matter what their alleged pedigree or purported community stature.[17] The broad language deliberately employed by Congress when drafting RICO, and § 1962 in particular, *see H.J., Inc.*, 492 U.S. at 232-33, and the statute's Liberal Construction Clause, compel its straightforward application here to provide a remedy to Petitioners.[18]

B. Petitioners Properly Pleaded Their Standing To Sue Under Section 1964(c) Of RICO In Accordance With This Court's Decision In *NOW*, Which The Court Below Ignored

Section 1964(c) provides that "any person injured in his business or property by reason of" a violation of § 1962 may bring a civil action and may recover treble

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1990) (same); Zvi Joseph, *The Application of RICO to International Terrorism*, 58 Fordham L. Rev. 1071 (1990); Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET"*, 73 Minn. L. Rev. 1023 (1989).

[17] *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989) ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."); *Sedima*, 473 U.S. at 499 (observing that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises" and that "[t]he former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences") (citing *Turkette*, 452 U.S. at 586-87).

[18] Congress expressly stated that RICO "shall be liberally construed to effectuate its remedial purposes." 84 Stat. 941 (1970). RICO is the "only substantive federal criminal statute that contains such a directive." *Russello*, 464 U.S. at 27. Thus, "RICO is to be read broadly" and the statute's remedial purposes are "nowhere more evident" than in the provision of a private action for those injured by racketeering activity. *Sedima*, 473 U.S. at 497-98.

damages. 18 U.S.C. § 1964(c). Thus, "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." *Sedima*, 473 U.S. at 495. Petitioners were defrauded into depositing their monies in (and leaving their funds on deposit with) the Bank as a result of BCCI's false financial statements and filings with government regulators, which enabled the Bank to continue to operate and misrepresent itself as a well-capitalized, safe, conservatively managed institution when, in fact, it was a criminal enterprise operating a Ponzi scheme. A-65 to A-113, A-189 to A-214. After regulators seized BCCI and Petitioners lost access to their deposits, the Bank was found to be "plainly and hopelessly insolvent" and ordered liquidated; the Complaint alleges that Petitioners have lost at least 75% of their deposits, A-115, A-116 to A-132.

Petitioners' injury and standing to sue were more than sufficiently alleged under *NOW*, 114 S. Ct. at 803, a civil RICO action brought by health care clinics – Delaware Women's Health Organization ("DWHO") and Summit Women's Health Organization, Inc. ("SWHO") – against anti-abortion groups:

> We have held that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. ___, ___ (1992) (citations omitted). The District Court dismissed petitioners' claim at the pleading stage pursuant to [Fed. R. Civ. P.] 12(b)(6), so their complaint must be sustained if relief could be granted "under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). DWHO and SWHO alleged in their complaint that the

> respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. Petitioners claimed that this conspiracy "has injured the business and/or property interests of the [petitioners]." In addition, petitioners claimed that respondent Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic. Paragraphs 106 and 110 of petitioners' complaint incorporate these allegations into the § 1962(c) [RICO] claim. *Nothing more is needed to confer standing on DWHO and SWHO at the pleading stage.*

114 S. Ct. at 803 (parallel citations and record references omitted). The decision of the court below, which affirmed dismissal of Petitioners' RICO claims for purported failure to allege standing, held exactly the opposite of *NOW*. The Ninth Circuit ignored this Court's precedent and *refused* to credit the Complaint's allegations that Petitioners were *injured* in their business or property by reason of BCCI's fraud, finding instead that the Bank was the *victim* of the fraud. A-15 to A-21. Its holding squarely conflicts with *NOW* and presents a compelling reason why this Petition should be granted.

C. Petitioners' RICO Claims Are Not "Derivative" Of Any Claims Purportedly Belonging To BCCI And The Decision Of The Court Below Conflicts With Decisions From The Second, Third, Fourth, Fifth And Seventh Decisions Recognizing Petitioners' Standing To Sue

While holding that Petitioners' RICO claims are "derivative" (*i.e.*, belonging to BCCI itself so that Petitioners lack standing to prosecute them), A-18, the court below ignored the Complaint's express allegations that BCCI was not a *victim* of the fraud – it *committed* the

fraud.[19] To say that BCCI owns the claims of those whom it defrauded is contrary to law and fact and in derogation of the Complaint's express allegations. Petitioners' claims are *not* derivative of BCCI and the Complaint alleges that this action "is not brought on behalf of or for the benefit of BCCI seeking to recover any damages on its behalf, assert any causes of action belonging to it or to remedy any loss suffered by it." Rather, it "is brought on behalf of [Petitioners] directly for the damages they suffered due to the operation of BCCI as a criminal enterprise" and "asserts causes of action belonging to them and which can be asserted only by them." A-66; *see also* A-113 to A-114.

The Ninth Circuit's conclusions that Petitioners' RICO claims are "derivative" of BCCI (and/or those "claims" purportedly belonging to its liquidators) *and* that they have no standing to assert them contradict the legal principle that a liquidator or trustee does *not* have standing to pursue damage claims on behalf of victims of wrongful conduct carried out by an insolvent entity, its officers and directors and the professionals who participate with them in schemes to defraud. In *Caplin*, 406 U.S. at 431-32, this Court held that the trustee of an insolvent entity does *not* have standing to sue on behalf of victims of its fraud and cannot preempt the victims' lawsuit because they have standing to pursue their *own* claims.[20]

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[19] In *NOW*, this Court stated that "the 'enterprise' in subsection (c) [of § 1962] connotes generally the *vehicle* through which the unlawful pattern of racketeering activity is committed, rather than the *victim* of that activity." 114 S. Ct. at 804. *See also Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163, 1171, 1173 (1993); *Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 265-68 (3d Cir. 1995). The Complaint alleges that BCCI was a *perpetrator* of RICO predicate acts, *not* a victim of *others'* criminal acts. A-65 to A-67, A-113 to A-115. The court below ignored (or misread) Petitioners' allegations.

[20] *Caplin* holds that a bankruptcy trustee has *no standing* to raise claims on behalf of the estate's creditors (*i.e.*, victims of

That principle has been consistently followed in the federal courts until the Ninth Circuit's decision in this case.[21] Therefore, BCCI's liquidators – which may not even have the power of a U.S. bankruptcy trustee (indeed, the court below made no findings on this important issue) – lack standing to assert Petitioners' claims because they are *not* derivative.[22]

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alleged breaches of duty), and emphasizes that victims should be permitted to bring their *own* action, make their own decisions and have control of litigation brought on their behalf. 406 U.S. at 431. *Caplin* directly supports Petitioners' standing to sue here because this Court emphasized that *"a suit by the trustee in reorganization does not pre-empt suits by individual debenture holders," id.* at 431-32 (footnotes omitted), because the trustee does *not* have the right or authority to assert the "individual" or "personal" claims of shareholders, creditors (including depositors) or third parties.

[21] *See, e.g., In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994); *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) ("the trustee . . . has no right to enforce entitlements of a creditor"); *In re Rare Coin Galleries, Inc.*, 862 F.2d 896, 900 (1st Cir. 1988) ("The trustee . . . has no power to assert any claim on behalf of the creditors when the cause of action belongs solely to them."); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) (creditors could not assign to trustee causes of action alleging that bank had participated in, had knowledge of, or approved debtor's Ponzi scheme); *Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523, 527 (9th Cir. 1976) ("quickly dispos[ing]" of claims that bankruptcy trustee asserted on behalf of the bankrupt's creditors and debenture purchasers, stating that trustee "has no standing to maintain the action on the part of any person or entity other than his debtor corporation").

[22] In the courts below, defendants never admitted that BCCI's liquidators *have* standing to pursue claims against them; instead, they asserted only that Petitioners *lack* standing. The Ninth Circuit affirmed dismissal of Petitioners' RICO claims without *any* factual findings regarding BCCI liquidators' power and/or ability to sue wrongdoers. A-20 to A-21.

The decision of the court below ignores well-settled law holding that when creditors of an insolvent entity have been victimized by fraud committed by the corporation and the officers, directors and professionals who participated therein, *those creditors have standing to directly pursue RICO claims against the non-bankrupt wrongdoers.* Thus, *GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289 (2d Cir. 1994), held that a creditor (noteholder) had standing to bring a RICO claim against persons and entities which allegedly looted the assets of the corporate maker of a $500,000 promissory note given in exchange for settlement of prior unrelated litigation. Relying on numerous Second Circuit decisions, Judge Lumbard stated that "[w]hen a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, *those creditors have standing,*" even though the looting did not specifically target the creditor (noteholder) as opposed to other creditors. *Id.* at 293 (citations omitted). *In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991), held that creditors had standing under RICO to complain about a fraudulent scheme under which the seller of a steel company allegedly conspired with the debtors' parent corporation in order to create (and artificially maintain) the debtors through cash infusions from the seller for the purpose of defrauding the Pension Benefit Guaranty Corporation from reimposing liability on the seller for vested pension benefits that the debtors assumed as part of the transaction. Judge Posner "agree[d] that the creditors have standing to complain about the alleged fraud even though they were not its primary victims – the Pension Benefit Guaranty Corporation was," *id.* at 1279, explaining that "[o]ne can be an intended victim without being the primary victim." *Id.*[23] Other circuit courts have

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[23] Thus, creditors who were "secondary" victims of the fraud had standing because defendants "had to fool [plaintiff] in order to [maintain the fraudulent scheme]. Fooling [plaintiff]

concurred,[24] but the court below ignored these precedents.[25]

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was an intended step in the overall scheme and the fact that it was an intermediate step . . . does not defeat their rights." *EDC*, 930 F.2d at 1279-80. In this case, Petitioners alleged that they were both primary *and* intended victims of defendants' fraudulent scheme. A-65 to A-67, A-113 to A-114. Even *if* the fraud was directed against BCCI (which it was not), Petitioners were at least "intended" victims of the fraudulent scheme and their standing to sue under § 1964(c) of RICO is clear.

[24] *See, e.g., Ashland Oil v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989) (oil suppliers who sustained injury when distributor fraudulently obtained large quantity of oil from them and diverted it to other concerns prior to filing for bankruptcy relief had RICO standing); *Ocean Energy II v. Alexander & Alexander*, 868 F.2d 740, 747 (5th Cir. 1989) (policyholder of insolvent insurance company has standing to bring RICO action against agent that wrongfully induced purchase of policy and policyholder's damages arising out of insurer's insolvency are not property of insurer's estate; "Pressure Services was the target and victim of the alleged scheme to induce it to purchase insurance from Transit. . . . *Only* Pressure Services has standing to sue for these damages allegedly caused by fraud directed against it."); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (allowing RICO claims brought by creditors when defendants stripped debtor of its assets after fraudulently inducing extension of credit creating impression that debtor was solvent; "[T]here is no question that as allegedly intended victims of the scheme the plaintiffs were injured in their business or property by reason of the alleged violations" of RICO) (citation omitted). *See also* 2 Arthur F. Mathews, *et al., Civil RICO Litigation*, § 8.04[C][3], at 8-74 to 8-75, § 8.04[C][3][b][ii], at 8-86 to 8-89 (1992).

[25] In *Holmes v. Securities Investment Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311 (1992), where the RICO action filed by SIPC was founded on its subrogation to the rights of the broker-dealer account holders who suffered injury because the brokerage firm was forced into insolvency by defendants' misconduct, this Court held that the link was too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers. In other

Contrary to the Ninth Circuit's conclusion, *see* A-17 to A-19, this case is *not* like *Sunrise*, where a thrift institution that failed due to mismanagement, *not criminal misconduct*, was subject to the U.S. banking system's comprehensive regulatory scheme, which provided Federal Savings and Loan Insurance Corporation ("FSLIC") deposit insurance covering virtually all depositors' losses and authorized a governmental receiver, the Federal Deposit Insurance Corporation ("FDIC"), to sue to recover not only what was paid by FSLIC to cover deposits, but also to make good depositors' *uninsured* losses. Under this distinguishable set of facts, the Third Circuit affirmed entry of summary judgment, *not* a motion to dismiss.[26] That court has limited *Sunrise* to its

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words, the conspirators allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. This Court acknowledged, however, that those customers who owned manipulated securities would *themselves* be the victims of defendants' fraud with standing to sue:

> We do not rule out that, if, by engaging in the [stock] parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," the broker-dealers' customers might be proximately injured by these offenses.

112 S. Ct. at 1320 n.19 (quoting 18 U.S.C. § 1961(1)(D)) (citations omitted). The same principle applies here and demonstrates why Petitioners have standing to assert RICO claims against defendants.

[26] In *Sunrise*, the FDIC, acting as statutory receiver, took over the thrift, paid off depositors up to the $100,000 FSLIC insurance limit and, pursuant to its statutory authority, sued wrongdoers for mismanagement of and *fraud on the thrift* seeking to obtain monies to distribute in a statutory priority of distribution scheme, including payments for uninsured deposits. *Eighteen months after the FDIC filed suit*, five depositors (who had already been repaid $100,000 each, received partial payments on their "uninsured" interest and were owed just $1,879 each) brought a RICO action. The FDIC settled its suit

unique facts, as shown by *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), which upheld RICO claims brought by policyholders of an insolvent insurer who contended that accountants had wrongly certified the insurer's financial statements, even though state insolvency proceedings existed where a receiver could pursue claims on behalf of failed entities. The court distinguished *Sunrise* because "the policyholders do not allege that [Peat Marwick's] actions caused Mutual Fire's insolvency, *but rather that [Peat Marwick] wrongfully certified Mutual Fire's financial statements, upon which the policyholders relied to their detriment*," emphasizing that "the policyholders have standing to sue [Peat Marwick]."[27]

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with court approval over plaintiffs' objections, recovering additional funds to be applied to depositors' claims. Then, and only then, *and with the FDIC's support*, did the district court *grant summary judgment*, holding that plaintiffs lacked standing. In affirming, the Third Circuit stressed "important policy considerations" because "continuation of plaintiffs' suit could disrupt the efforts of FDIC to recover the institution's assets, which were depleted by defendants' mismanagement" for equitable distribution "in accordance with the federal priority scheme." *Sunrise*, 916 F.2d at 888. The FDIC objected to depositors' RICO suit as an "inequitable and inefficient" disruption of its rehabilitation efforts, an action which "threatens to further complicate the immense task of liquidating the institution's assets." *Id.* at 889. None of these facts were present in this case, but the court below ignored these distinguishing factors in embracing *Sunrise*. *See* A-17 to A-19.

[27] *University of Maryland*, 923 F.2d at 274 (citation omitted). In *Hayes v. Gross*, 982 F.2d 104 (3d Cir. 1992), the Third Circuit again refused to follow *Sunrise*, holding that stock purchasers in a savings association who alleged that its officers and directors had misrepresented its financial condition, thereby causing the purchasers to pay an inflated price for its stock, could assert their claims directly against the corporate insiders. The court expressly rejected the notion advanced by the Ninth Circuit in this case that permitting the shareholder's action to proceed

Petitioners allege that BCCI's false financial statements were used to solicit deposits and deceive regulators into permitting the Bank to continue to operate (and thereby obtain more deposits) *and* create a false impression which continually misled Petitioners into believing that BCCI was well-capitalized and operating lawfully. A-65 to A-67, A-115 to A-132, A-189 to A-214. Under the decisions from the Second, Third, Fourth, Fifth and Seventh Circuits cited above, Petitioners have standing to sue but the court below incorrectly held that their claims are "derivative" and belong to the Bank that defrauded them. A-17 to A-20. The unjustness of this holding is evident because BCCI was established in "secrecy" jurisdictions where there is little, if any, deposit insurance. Unlike *Sunrise*, this case does *not* involve a comprehensive statutory scheme in which one liquidator is empowered to pursue claims for the benefit of all depositors. Petitioners' Complaint asserts legal claims that are subject to the *least* defenses and will produce a recovery for the victims undiluted by *in pari delicto* defenses, comparative fault reductions, criminal penalties, liquidation expenses, or other creditors' claims.

Petitioners may sue under § 1964(c) of RICO because they have been injured in their business or property by reason of defendants' racketeering activity and these claims, if not pursued by BCCI's victims, will *never* be pursued on their behalf by liquidators who lack standing

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would result in a "double" recovery, asserting that "we see no conflict between plaintiff's interest and those of the creditors and other stockholders." *Id.* at 108. *Accord Riley v. Simmons*, 45 F.3d 764, 774-75 (3d Cir. 1995). In *Howard v. Haddad*, 916 F.2d 167 (4th Cir. 1990), where a shareholder brought claims against the officers of a failed bank alleging that defendants induced him to purchase the bank's stock without disclosing its precarious financial condition, the Fourth Circuit held that the shareholder's claims were *not* derivative because his claims were based upon misrepresentations, not mismanagement of the bank, thereby establishing his standing to sue. *Id.* at 170.

to do so. Yet, Petitioners' meritorious claims against BCCI's officers and directors and the professionals who participated in the criminal enterprise will *never* be litigated and Petitioners' deposits, which were frozen *more than four years ago*, will be lost forever.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

DATED: October 31, 1995

Respectfully submitted,

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Attorneys for Petitioners

Akhtar HAMID, on Behalf of Himself
and all Others Similarly Situated,
Plaintiffs-Appellants,

v.

PRICE WATERHOUSE, Price Waterhouse/U.K.; Price Waterhouse World Firm Ltd.; Price Waterhouse/U.S.; Ernst & Young; Abu Dhabi, Emirate of Abu Dhabi; Abu Dhabi Investment Authority; Bank of America Corporation, Bankamerica Corp.; Bank of America NT & SA; Hill & Knowlton; Concorde Finance & Investments, GRP Investments; Interredec, Inc.; Interredec Southern Co.; et al.; First American Corp., First American Bankshares; Paul Adams; Jack Beddow; A. Vincent Scoffone; T. Bertram Lance; Independence Bank; Manuel Noriega; Fulvio Dobrich; Robert Altman; Clark Clifford; Clifford & Warnke, Defendants-Appellees.

Akhtar HAMID, on Behalf of Himself
and all Others Similarly Situated,
Plaintiffs-Appellees,

v.

PRICE WATERHOUSE, Price Waterhouse/U.K.; Price Waterhouse World Firm Ltd.; Price Waterhouse/U.S.; Ernst & Young; Abu Dhabi, Emirate of Abu Dhabi; Abu Dhabi Investment Authority; Bank of America Corporation, Bankamerica Corp.; Bank of America NT & SA; Hill & Knowlton; Concorde Finance & Investments, GRP Investments; Interredec, Inc.; Interredec Southern Co.; et al.; T. Bertram Lance; Independence Bank; Manuel Noriega; Fulvio Dobrich; Robert Altman; Clark Clifford; Clifford & Warnke, Defendants,

and

First American Corp., First American Bankshares, Inc.; Paul G. Adams; Jack Beddow; A. Vincent Scoffone; Defendants-Appellants.

Akhtar HAMID, on Behalf of Himself and all Others Similarly Situated, Plaintiffs-Appellees.

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PRICE WATERHOUSE, Price Waterhouse/U.K.; Price Waterhouse World Firm Ltd.; Price Waterhouse/U.S.; Ernst & Young; Abu Dhabi, Emirate of Abu Dhabi; Abu Dhabi Investment Authority; Bank of America Corporation, Bankamerica Corp.; Bank of America NT & SA; Hill & Knowlton; T. Bertram Lance; Independence Bank; Manuel Noriega; Robert Altman; Clark Clifford; Clifford & Warnke, First American Bankshares, Inc.; Jack W. Beddow; Paul G. Adams; A. Vincent Scoffone, Defendants,

and

Concorde Finance & Investments; Interredec, Inc.; Interredec Southern Company, Inc.; Wesley Company, Inc.; River Oaks, Inc.; River Oaks Investments, Inc.; Sterling Bluff, Inc.; GRP Investments N.V., Defendants-Appellants.

Nos. 93-56085, 92-561998 and 92-56199.

United States Court of Appeals
Ninth Circuit.

Argued and Submitted Jan. 31, 1994.

Decided April 7, 1995.

Before BROWNING, BOOCHEVER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is an appeal from dismissal of a class action by depositors in the Bank of Credit & Commerce International ("BCCI"). The issues we resolve involve timeliness of appeal, judicial recusal, the derivative nature of the depositors' RICO claims, and the application of the Alien Tort Statute.

We have jurisdiction over depositors' claims pursuant to 28 U.S.C. § 1291. We review the district court's dismissal for failure to state a claim *de novo*. *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc). A district court's refusal to disqualify the sitting judge may be reversed only for an abuse of discretion. *Thomassen v. United States*, 835 F.2d 727, 732 (9th Cir.1987).

I. FACTS

This case was dismissed for failure to state a claim upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6). We therefore are bound to evaluate whether the complaint states causes of action on the assumption that appellants could prove the averments. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir.1994).

Appellants claim to represent depositors of funds in what they call "the constellation of banks known as Bank of Credit & Commerce International ("BCCI")." They do not sue the "constellation of banks." They sue seventy-seven people, firms, and a foreign country.

The complaint alleges that the seventy-seven defendants illegally acquired various banks in the United States, caused deposits to be misused and misappropriated, and, by misrepresenting facts about BCCI, delayed the day when regulators would shut it down. By making the bank appear to be in better financial condition than it really was, some defendants are alleged to have enabled it to attract deposits which it otherwise would have been unable to obtain. Most of the Complaint consists of elaborating the egregiousness of the misuse and misappropriation of funds, including allegations of financing international terrorism, narcotics, and arms dealing, and using bribery and fraud to keep governments from interfering with BCCI's and the defendants' activities, along with extensive polemical elaborations such as pointing out that the "BCCI pirates" were "men in business suits." The looting which allegedly caused the bank to be unable to pay the depositors included loans to insiders which were intended never to be repaid.

The district court dismissed depositors' RICO claims without leave to amend after they filed their third amended complaint. Appellants' arguments go to whether their claims were such that relief could be granted, not whether they could have stated valid claims had they been given another chance to amend.

Facts dealing with particular issues are explicated more fully below, in the discussions of the issues.

II. ANALYSIS

A. Appellate Jurisdiction

We must first decide whether the appeal was untimely, depriving us of jurisdiction. The complaint went through four iterations. The district court dismissed the third amended complaint on April 30, 1992. On May 11, the plaintiffs moved to recuse Judge Marshall, on the ground that the employment plans of her law clerks required her to be disqualified. They also filed a motion under Federal Rule of Civil Procedure 52(b) to vacate the April 30 judgment on the basis of Judge Marshall's alleged disqualification. They did not appeal at that time.

Judge Marshall issued a corrected version of her order and judgment May 20. Judge Byrne denied the motion to recuse Judge Marshall July 9. Judge Marshall then denied the Rule 52(b) motion July 27. Plaintiffs filed their notice of appeal August 19. The appeal is directed to the merits of the dismissal, not just to whether Judge Marshall should have been recused. The appellate jurisdiction issue is whether the appeal was timely as to the merits. On its face, an August 19 appeal from a May 20 judgment comes more than thirty days after the judgment. *See* Fed. R. Civ. P. 4(a)(1).

Appellees argue that the motion to vacate the judgment could not properly be characterized as a Rule 52(b) motion, that it should not be characterized as a Rule 59 motion which would toll the running of the thirty days, and that as a Rule 60(b) motion, it would not toll the

thirty days. They are correct about Rule 52(b). That rule governs motions to amend findings of fact. This case was dismissed before trial; the district court did not hear evidence or make findings. Nor was the motion directed toward correction of any findings. It related solely to recusal because of the law clerks' conflicts of interest.

Appellees are also correct that at the time the notice of appeal was filed, a Rule 60(b) motion was not among those which would toll the thirty days for filing notice of appeal. Fed.R.App.P. 4(a)(4).[1] We are nevertheless satisfied that appellants' motion, denominated incorrectly as a Rule 52(b) motion, should properly be deemed a Rule 59(e) motion. If a timely Rule 59 motion is filed, the thirty days for appeal does not begin to run until entry of the order on that motion. Fed.R.App.P. 4(a)(4).

The motion to vacate on the ground that the judge should have recused herself appears on its face to be no more of a Rule 59 than a Rule 52(b) motion, for the same reasons. Nevertheless, our precedents require that we treat a motion to vacate an order of dismissal as a Rule 59(e) motion. *Mir v. Fosburg*, 646 F.2d 342, 344 (9th Cir.1980). Our precedents also require that we treat a motion which could have been made as a timely Rule 59 motion as though it were so made. *Sierra On-Line, Inc. v.*

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[1] The notice of appeal was filed August 19, 1992. The amendment at Fed.R.App.P. 4(a)(4)(F), which provides that the time for appeal runs from the entry of the order disposing of a motion for relief under Rule 60, was not yet in effect. Because we conclude that appeal was timely under the rules in effect in 1992, we do not have occasion to decide whether the 1993 amendment would affect pending appeals filed prior to the date of the amendment.

Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir.1984). This liberality has the practical effect of letting appeal wait until the timely post-trial motion has been decided. The 1993 amendments to Federal Rule of Appellate Procedure 4(a)(4) will no doubt obviate this confusion.[2]

The appeal was timely as to the merits, not just as to recusal, so we have jurisdiction.

B. Recusal

The appellants claimed below, and argue here, that Judge Marshall should have recused herself from the case because of her law clerks' employment plans. The motion to recuse Judge Marshall and vacate the judgment on this ground was denied by a different district judge, Judge Byrne. We review the district court's denial of the recusal

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[2] Fed.R.App.P. 4(a)(4), as amended effective December 1, 1993, provides as follows:

> (4) If a party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rule of Civil Procedure:
> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
> (C) to alter or amend the judgment under Rule 59;
> (F) for relief under Rule 60 if the motion is served within 10 days after entry of judgment. . . .

The amendment changed the wording, changed the numbering of the subsections, and added the reference to Rule 60. Under the rule previously in effect, reference was made to motions under Rules 50(b), 52(b), and 59, but not 60.

motion for abuse of discretion, *Thomassen v. United States*, 835 F.2d 727, 732 (9th Cir.1987), and find none.

A federal judge must disqualify herself from any proceeding in which her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). The test for recusal in this circuit is " 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' " *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 714 (9th Cir.1990) (quoting *Herrington v. Sonoma Cty.*, 834 F.2d 1488, 1503 (9th Cir.1987)). Depending on how an individual judge manages her chambers, a law clerk's role in her decisionmaking may be quite significant. Even if the judge has no reason to recuse herself based upon her own circumstances, a law clerk's relationships might cause the impartiality of decisions from that judge's chambers in which the clerk participates reasonably to be questioned.

However, "[i]f a clerk has a possible conflict of interest it is the clerk, not the judge, who must be disqualified. . . . [A] law clerk's acceptance of future employment with a law firm would [not] cause a reasonable person to doubt the judge's impartiality so long as the clerk refrains from participating in cases involving the firm in question." *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir.1986), *quoted in Milgard*, 902 F.2d at 714.

Two of Judge Marshall's law clerks' employment relationships are at issue, and they are different. Clerk One served as Judge Marshall's law clerk during the earliest stages of the case at bar, and he subsequently became an associate at Debevoise & Plimpton ("the Debevoise firm"). The Debevoise firm represents one of

the named defendants, Price Waterhouse/United States. Clerk One filed a sworn declaration stating that he did no work at all on the case at bar while he clerked for Judge Marshall. He says he read the complaint (a public document) on his last day clerking and put it in Judge Marshall's file, but did not ever discuss the case with the judge or have any other involvement with the case during his clerkship. At the time he left his clerkship, Clerk One did not know that the Debevoise firm would subsequently appear for a defendant.

Clerk One had no involvement in the case at bar which would give rise to a disqualification of Judge Marshall. A reasonable person knowing all the facts regarding Clerk One's relationship with the Debevoise firm and his lack of involvement in the case at bar would not conclude that the impartiality of Judge Marshall's decision in the case should be questioned. The rule laid down in *Hunt* and *Milgard* would prevent recusal on account of Clerk One's relationship with the Debevoise firm because Clerk One did not work on the case at bar. His advice to and research for Judge Marshall could not be tainted if he gave no advice and did no research.

Judge Marshall's other law clerk, Clerk Two, did extensive work on the case. The question regarding Clerk Two is either he had a disqualifying relationship with a law firm such that Judge Marshall should have taken him off the case. Mr. Lerach, plaintiffs' counsel, filed a declaration asserting that he had learned that (1) Clerk Two was on a "leave of absence" from Skadden, Arps, Slate, Meagher & Flom ("the Skadden firm") during his clerkship with Judge Marshall, (2) the Skadden firm represented Clark Clifford and Robert Altman, defendants in

the case at bar, in a criminal case arising out of their involvement with BCCI, and had accepted service of process for them in the case at bar; and (3) Clerk Two "was scheduled" to return to the Skadden firm when he finished his clerkship, but "at the last moment" instead went to work at a different law firm "in the same building as Skadden, Arps and on a contiguous floor."

No reasonable person would suspect that a law clerk was slanting his advice to a judge in favor of a law firm because the clerk subsequently went to work for a different law firm "in the same building . . . on a contiguous floor." It is to filter out fantastic suggestions like this that the word "reasonable" is part of the recusal test.

However, a reasonable person might be concerned whether a law clerk's advice to a judge would be biased in favor of the position taken by a firm, if the law clerk had worked there before his clerkship, was on a leave of absence, and planned to work there after his clerkship. *Cf. Hunt*, 783 F.2d at 1015. Clerk Two, however, filed a declaration stating that this was not what had happened. He asserted that he had "terminated" his employment at the Skadden firm prior to his clerkship, and although the firm had made him an offer, he had not resumed employment with the firm and had accepted an offer from a different firm. He also said that during the time he worked on the case at bar for Judge Marshall, he "was unaware" that the Skadden firm represented any clients in matters relating to BCCI, the firm did not appear for anyone in the case, and he had not communicated with anyone in the firm about the case. The Skadden firm in fact has not appeared for any party in the case at bar.

Judge Byrne accepted the truth of Clerk Two's representation that he did not know the Skadden firm had a role of any kind relating in any way to the BCCI case. We conclude that Judge Byrne did not abuse his discretion in deciding that Clerk Two's prior association with the Skadden firm required neither his removal from the case nor Judge Marshall's recusal because of his failure to remove himself.

Because of the very large number of defendants and law firms involved in this case, the likelihood that a law clerk would have some sort of connection to one of them is higher than in most cases, and the likelihood that that connection would matter is lower. A reasonable observer would more likely see any relationship "as implicit in the special circumstances [of the complexity of the case and large number of parties and law firms involved] rather than as an odd coincidence the failure to avoid which might suggest bias." *In re Allied-Signal, Inc.*, 891 F.2d 967, 971-72 (1st Cir.1989). The question of bias is one of whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. It is not a question of whether a line can be drawn connecting a person within chambers to a person or firm related, no matter how remotely, to a party in the case.

We need not determine whether a different conclusion could be reached on the facts. It is enough that Judge Byrne did not abuse his discretion in deciding that Judge Marshall need not have recused herself on account of her law clerks' professionsal relationships with the two law firms.

C. Law of Nations

The complaint alleges that the seventy-seven defendants committed "torts in violation of the laws of nations and treaties of the United States." It does not specify which treaties, and the appellate briefs apparently do not dispute the correctness of the district court's dismissal of any claims based on violations of treaties. The complaint alleges the defendants violated the law of nations by causing the bank to loan money to criminals and to insiders and bribing or lying to bank regulators.

Because many of the members of the purported class are aliens, appellants argue the district court had jurisdiction to decide this claim under the Alien Tort Statute, 28 U.S.C. § 1350. The Alien Tort statute provides: "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* The district court dismissed this cause of action without leave to amend because the depositors did not allege official action or a violation of the law of nations.

The Alien Tort Statute has seldom been invoked, so precedent is sparse for the definition of "law of nations." Analyzing the scope of the Alien Tort Statute, the Second Circuit noted that "although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). We have previously stated "[t]he debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." *Trajano v.*

Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.), 978 F.2d 493, 498 (9th Cir.1992).

We do not need to reach the issue of whether the law of nations applies to private, as opposed to governmental conduct. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C.Cir.1985) (law of nations does not reach private, nonstate conduct); *IIT*, 519 F.2d at 1015 (violation of law of nations arises only when relationship between states or between individual and state is affected). *Compare Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir.1980) (act of torture committed by state official violated law of nations) *with Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791, 819 (D.C.Cir.1984) (per curiam) (Edwards, J., concurring and Bork, J., concurring) (affirming dismissal of action by Israeli citizens against PLO terrorists and distinguishing *Filartiga* as involving official action). Deciding whether private conduct is subject to the law of nations would not resolve the case, because the complaint alleges that the Emirate of Abu Dhabi and Abu Dhabi Finance Department were among the wrongdoers.

The wrongs alleged are in substance fraud, breach of fiduciary duty and misappropriation of funds. Although the conduct was international in scope, no violation of what has traditionally been the subject of international law is claimed. International law includes more than international treaties. *See, e.g., Estate of Marcos*, 978 F.2d at 499 (official torture); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir.1980) (same). But looting of a bank by its insiders, and misrepresentations about the bank's financial condition, have never been in the traditional classification of international law. These are garden variety violations of statutes, banking regulations, and common

law. We agree with the view of the Second Circuit, as stated in *IIT*:

> [w]e cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by any one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."

IIT, 519 F.2d at 1015 (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D.Pa.1963)). That case was conceptually similar to the case at bar, in that it alleged an international scheme of fraud, conversion and corporate waste. *See also Filartiga*, 630 F.2d at 888-89 (distinguishing official torture, actionable under Alien Tort statute, from *IIT*). The standards alleged to have been violated by the defendants in the case at bar are not of a kind affecting the relationship between states or between an individual and a foreign state, and used by those states for their common good in dealings *inter se*.

Our reasons for adopting the *IIT* rule are well stated in *Filartiga*:

> The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon

> others, in the name of applying international law.

Filartiga, 630 F.2d at 881.

> Because appellants' claims of fraud, breach of fiduciary duty, and misappropriation of funds are not appropriately considered breaches of the "law of nations" for purposes of jurisdiction under the Alien Tort Statute, Count IV was properly dismissed.

D. RICO

Most of the complaint purports to allege civil RICO claims. The statute provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" has a cause of action for which treble damages may be recoverable. 18 U.S.C. § 1964(c). Appellants allege that they were depositors in BCCI, and that because it violated the law and collapsed, it failed to pay them the money they were entitled to as depositors. Appellants allege that all four subsections of section 1962[3] were violated by some or all defendants, by means

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[3] Section 1962(a) provides that it is "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Section 1962(b) provides that it is "unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

of predicate acts ranging from wire and mail fraud to drug transactions and weapons dealing. The defendants include seventy-seven firms and individuals alleged to have looted the bank for personal gain, caused it to loan its money to criminals, caused it to appear more sound than it was to bank regulators, and otherwise to have contributed to its wrongful conduct or its inability to pay its depositors. The bank itself is not a defendant.

In order to plead a civil RICO claim, appellants must show that the defendants' violation of section 1962 was the proximate cause of their injury. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1317, 117 L.Ed.2d 532 (1992); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir.1994). Some of the wrongs alleged would tend to increase rather than reduce the ability of the bank to pay its debts. For those wrongs, the appellants have alleged no proximate cause linking the RICO violations with injury to their property.

Appellants have also pleaded various wrongs which had the effect of making BCCI less able to pay its debts. As depositors, the members of the appellant class are creditors of BCCI. *Bank of Marin v. England*, 385 U.S. 99, 101, 87 S.Ct. 274, 276, 17 L.Ed.2d 197 (1966); *Brown v. New York Life Ins. Co.*, 152 F.2d 246, 249 (9th Cir.1945). They

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Section 1962(c) provides that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Finally, section 1962(d) provides that it is "unlawful for any person to conspire to violate" the preceding three subsections.

allegedly loaned money to BCCI which, because of various wrongs by defendants, it was unable to pay back. To the extent that the alleged wrongs reduced the ability of the bank to pay its debts, or caused it to be in business for a longer time than it should have been so that it could continue to borrow money from depositors fooled about its true condition, the wrongs would have the practical consequence of harming the depositors.

The question is whether persons whose injury is in this manner indirect have standing to assert a RICO claim. BCCI, the allegedly dishonest and defaulting debtor, is not a defendant. Instead, other people and firms, who allegedly contributed to BCCI's condition, but who themselves had no direct relationship to the appellants and caused them no direct harm, are the defendants. Suppose the "BCCI pirates" looted the bank just as the complaint says. Can a depositor in a bank sue a bank robber?

The standing question has been answered persuasively by the Third Circuit, in *Popkin v. Jacoby (In re Sunrise Sec. Litig.)*, 916 F.2d 874, 880 (3d Cir.1990). In that case too, depositors of a failed bank sued the insiders whom they claimed looted it and misrepresented its condition. The claims were substantially the same as in the case at bar:

> The essence of the complaint is that defendants misrepresented the financial condition of [the bank] by failing to disclose that they had mismanaged [the bank] rendering the institution

> insolvent, and that they had employed deceptive operating practices, which prevented federal and state regulators from acting in a timely manner to forestall the insolvency of [the bank].

Id. at 883. The Third Circuit held that depositors asserting a RICO claim because the bank had become unable to pay its debts should be treated the same as shareholders in a corporation. For both classes, where the harm is to all the members, and the injuries claimed by the plaintiffs are not separate and distinct from those to shareholders or depositors generally, the RICO claim is derivative and there is no standing on the part of the shareholders or depositors to assert it.

The Second Circuit has ruled the same way.

> As a general rule, wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank, and only the bank or its receiver may sue for its recovery.

Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir.1979).

Sunrise's analogy to shareholder suits is sound. Creditors of a bankrupt corporation generally do not have standing under RICO. *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2d Cir.1993). "The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations." *Id.* When a creditor suffers injury that is "independent of the firm's fate," his injury is direct and he may pursue his own remedy; otherwise the injury is derivative and the creditor must take this "place in line" as a creditor in the bankruptcy action. *Mid-State Fertilizer Co. v. Exchange*

Nat'l Bank of Chicago, 877 F.2d 1333, 1336-37 (7th Cir.1989). *Cf. Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635, 640 (9th Cir.1988) (shareholder lacks standing to assert RICO claim unless he shows either an injury distinct from that to other shareholders or a special duty owned by the defendant to the shareholder).

The rationale supporting the analogy is compelling. "[P]ermitting depositors to bring individual actions for such injuries [ ] would invariably impair the rights of other general creditors and claimants with superior interests." *Sunrise*, 916 F.2d at 887. Under the facts of *Sunrise*,

> continuation of plaintiffs' suit could disrupt the efforts of FDIC to recover the [bank's] assets, which were depleted by defendants' mismanagement and wrongdoing, for equitable distribution among all depositors and creditors in accordance with the federal priority scheme. . . . According to the FDIC, permitting plaintiffs to sue directly for claims emanating from injury to the [bank] would circumvent the priority scheme by enabling depositors to recover the [bank's] assets in advance of other general creditors and claimants with superior interests, such as secured creditors. This result, argues FDIC, is both inequitable and inefficient, and threatens to further complicate the immense task of liquidating the [bank's] assets.

Id. at 888-89 (emphasis in original). The Seventh Circuit has made the same point in the context of a shareholder's RICO claim, noting that allowing the derivative suit

would lead to double counting of damages and would interfere with an equitable liquidations process:

> Recovery by the firm, followed by division according to entitlements, is especially important when the firm has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets – to pay off one set of creditors . . . while keeping the proceeds out of the hands of the firm's other creditors.

Mid-State, 877 F.2d at 1336.

This line of reasoning applies fully to the case at bar. BCCI is being liquidated in international proceedings in Luxembourg. Its assets located in the United States have been forfeited and are subject to control of the Justice Department. The appellants in this case have claims similar to those of many other potential claimants. Their claims, if allowed in this lawsuit, would enable them to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets and of the assets of any wrongdoers who may owe money to the failed bank on account of their wrongs. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185 (D.C.Cir.1995). Half of the sums recovered will be surrendered to a global liquidation fund set up to facilitate a "general global distribution to creditors and depositors." *Id.* at 1187. The other half has been reserved for the Attorney General's discretionary allocation to purposes including offsetting losses to the Federal Deposit Insurance Corporation, *id.*, and "protect[ing] the rights of innocent persons." *Id.* at 1192, *quoting* 18 U.S.C. § 1963(g)(1). Recently, these appellants attempted to convince one of our sister

circuits that they were entitled to an interest in the property so forfeited, the "nature and extent" of which interest could be found in the complaint filed in the case at bar. *Id.* at 1188. Appellants' attempt to jump in line ahead of other creditors was rebuffed in that case, and it is rebuffed here.

Appellants would have us distinguish *Sunrise* and the other cases on derivative claims, on the basis of *Hayes v. Gross*, 982 F.2d 104 (3d Cir.1992). In *Hayes*, purchasers of stock alleged that they paid too much because of fraud on the market, and sued the officers and directors of the corporation under the Securities and Exchange Act of 1934. The Third Circuit distinguished *Sunrise*, and held that the claim was not derivative. It reasoned that the injury claimed was distinct from the injury to the corporation and the indirect injury to stockholders generally, and also that the claim would neither prejudice the corporation and its other stockholders nor permit a double recovery for the same injury. In that case, the harm would of course be only to the shareholders who bought in a market tainted by the misrepresentations, not to those who had bought before, and not to the corporation. We need not decide whether we would follow *Hayes*, because the facts of the case at bar are analogous to *Sunrise*, not *Hayes*.

Because the RICO claims were all properly dismissed for lack of standing, as derivative, we do not reach the questions raised by the parties as to the extraterritorial reach of RICO. We understand the argument to be whether Congress has the power to regulate the foreign conduct at issue, not whether the district court had jurisdiction to decide whether a claim upon which relief could

be granted had been pleaded. We assume without deciding that RICO would apply to the foreign wrongs. We do not reach the other rationales articulated by the district court as a basis for dismissal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated, Plaintiffs-Appellants, v. PRICE WATERHOUSE, et al., Defendants-Appellees.	No. 92-56085 92-56198, 92-56199 D.C. No. CV-91-4483-CBM ORDER

Before: BROWNING, BOOCHEVER and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing.

Judge Browning and Judge Kleinfeld vote to reject the suggestion for rehearing en banc, and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. Civ. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re BANK OF CREDIT AND COMMERCE INTERNATIONAL DEPOSITORS LITIGATION	No. MDL-908 No. CV 91-4483 CBM (Ex)
AKHTAR HAMID, et al., Plaintiffs, v. PRICE WATERHOUSE & CO., et al., Defendants.	ORDER VACATING MEMORANDUM OPINION; AMENDED MEMORANDUM OPINION

Upon review of the Court's Memorandum Opinion, the Court has discovered the following clerical errors:

1. On page 4, line 17 "million" should read "billion."

2. On page 19, line 4 "million" should read "billion."

In order to correct these clerical errors, the Court hereby vacates its Memorandum Opinion pursuant to Federal Rule of Civil Procedure 60(a) and issues the following Amended Memorandum Opinion.

AMENDED MEMORANDUM OPINION

These matters came on regularly for hearing on March 30, 1992 before the Court, the Honorable Consuelo B. Marshall, District Judge presiding, on plaintiffs' motion to add additional parties, brought pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure, and defendants' motions to dismiss plaintiffs' third amended complaint (the "Complaint"), brought pursuant to Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.[1] Also pending resolution are issues

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[1] These include: (a) the motion of defendants Bank of America NT&SA and BankAmerica Corporation (collectively "BofA") to dismiss; (b) the motion of defendant Price Waterhouse U.K. ("PW/UK") to dismiss; (c) the motion of defendant Price Waterhouse U.S. ("PW/US") to dismiss; (d) the motion of defendant Price Waterhouse World Firm Ltd. to dismiss and to strike; (e) the motion of defendants Clark Clifford, Robert Altman, and the law firm of Clifford & Warnke (collectively the "Clifford Defendants") to dismiss; (f) the motion of defendants InterRedec, Inc., InterRedec Southern Co., Inc., Wesley Co., Inc., River Oaks, Inc., River Oaks Investments, Inc., Sterling Bluff, Inc., Concorde Finance & Investments, and GRP Investments N.V. (collectively the "InterRedec Defendants") to dismiss; (g) the motion of defendants First American Corporation, First American Bankshares, Inc., Jack W. Beddow, Paul G. Adams, III, and A. Vincent Scoffone (collectively the "First American Defendants") to dismiss; (h) the motion of defendant Ernst & Young U.S. ("E&Y") to dismiss; (i) the motion of defendant Fulvio Dobrich to dismiss; (j) the motion of defendant Abu Dhabi Investment Authority ("ADIA") to dismiss; and (k) the motion of defendant Hill & Knowlton, Inc. ("H&K") to dismiss. Additionally, putative defendants Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., John G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff, all partners in Clifford & Warnke, have filed a motion to dismiss. However, plaintiffs added these

raised in defendant PW/UK's motion which the Court took under submission on January 15, 1992 (*i.e.*, whether to dismiss for lack of subject matter jurisdiction, on forum non conveniens grounds, or to abstain). Having considered the papers filed in connection with the motions and the arguments of counsel at hearing, the Court issues the following memorandum opinion.

I. STATEMENT OF FACTS

On July 5, 1991, banking regulators in the United Kingdom, Luxembourg, and the Cayman Islands seized the operations of the Bank of Credit and Commerce International.[2] At the time it was closed, BCCI operated 400 branches in over 70 countries and was the fifth largest private bank in the world. BCCI, S.A. will not reopen and is "hopelessly insolvent"; depositors' funds are frozen and unavailable. Potential claims against BCCI exceed its remaining assets, but the cooperative effort of liquidators in the United Kingdom, Luxembourg, and the Cayman Islands has resulted in a proposed settlement with BCCI's majority shareholders, Sheikh Zayed and the government

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individuals to the Complaint without first seeking leave of the Court to amend. Thus, neither these individuals, nor the motion they have filed, are presently before the Court.

[2] Related entities include Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., Bank of Credit and Commerce International Holdings (Luxembourg) S.A., International Credit and Investment Company (Overseas) Ltd., International Credit and Investment Company Holdings, and Credit and Commerce American Holdings, N.V. and its subsidiary Credit and Commerce American Investment, B.V. (collectively "BCCI").

of Abu Dhabi. The settlement contemplates a cash payment by Abu Dhabi of $ 2.2 billion, which would result in a distribution to depositors of between 25 and 40 percent of the deposits they lost.[3]

In the United States, BCCI operated agency offices at one time in Los Angeles, San Francisco, and Beverly Hills, California; Boca Raton, Miami, and Tampa, Florida; Houston, Texas; Chicago, Illinois; New York City, New York; and Washington, D.C. At the time BCCI was closed by regulators, only the Los Angeles and New York offices were operating. Plaintiffs allege that BCCI solicited and obtained deposits in the United States through these agency offices. *See* Complaint, ¶¶ 33, 289(g). Presently, the Superintendents of Banking of New York and California have seized BCCI assets and are proceeding to settle depositor claims. BCCI assets being marshalled in the United States far exceed potential claims and only the excess will be turned over to the foreign BCCI liquidators. As a result, no BCCI depositors who had money in United States offices on July 5, 1991 will lose their deposits.[4]

Plaintiffs purport to represent approximately 1 million BCCI depositors worldwide who have lost $ 6 billion

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[3] Many additional factors will affect depositors' ultimate recovery. For example, liquidators are presently pursuing additional claims on behalf of BCCI, including claims filed against both E&Y and various Price Waterhouse entities.

[4] Plaintiffs have not argued otherwise. They contend, however, that United States depositors presently suffer the loss of the use of their money, have suffered that loss since July 5, 1991, and will not recover interest on their deposits for this time.

as a result of the financial collapse and regulatory seizure of BCCI. Named plaintiffs consist of United States citizens (Hamid, Curran, Khorassanchy, and Chawla);[5] United States corporations (Soha, Inc. and Idriss Devco, Inc.); foreign corporations (S&L Gentrade, Inc. and Red Circle Investments, Ltd.); and foreign residents (Musleh, Hermans, Hasim, and Murbarek). Plaintiffs have named seventy-seven defendants on the basis of their various relationships to BCCI.[6] BCCI itself is not a defendant here because of international liquidation proceedings and a resulting bankruptcy stay entered in the United States. *See In re Petition of Brian Smouha*, No. 91-B-13569 (S.D.N.Y. Bankr.).

Plaintiffs' initial complaint alleged four claims for relief: Counts One through Three were brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sections 1962(a)/(d),[7]

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[5] Additionally, United States Citizens Philip Merz and Amit Pandya seek to be added to this action as plaintiffs.

[6] Plaintiffs characterize defendants as either (1) BCCI strawmen/frontmen or looters; (2) BCCI owners or founders; (3) BCCI officers or agents; (4) United States assistors or co-conspirators; (5) other United States instrumentalities; and (6) professional service providers to BCCI (*i.e.*, accountants, lawyers, and public relations firm). *See* Complaint, chart following page 47.

[7] Subsection (a) of 18 U.S.C. § 1962 provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise . . . .

(c)/(d),[8] & (b)/(d);[9] Count Four alleged a claim under the Alien Tort Statute, 28 U.S.C. § 1350.[10] On January 15, 1992, the Court issued its Order Re Dismissal and a More Definite Statement (the "Order"), in which the Court dismissed Count Four without leave to amend, but gave plaintiffs leave to amend the RICO claims contained in their 212-page second amended complaint.[11] In response to the Court's Order, plaintiffs filed their 482-page Complaint on January 20, 1992, attaching (and, in many cases, incorporating by reference) 2003 additional pages of exhibits.

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[8] Subsection (c) of 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

[9] Subsection (b) of § 1962 provides:

> It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . .

[10] Section 1350 provides a remedy in federal court for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." By its terms, the Alien Tort Statute only imposes liability for violation of a treaty or the law of nations. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980).

[11] Part of the Order was adapted from a RICO Standing Order or Case Statement issued by Judge Krenzler in *Lyman Steel Co. v. Shearson Lehman Bros., Inc.*, No. C 86-355 (N.D. Ohio Feb. 13, 1986). A similar RICO Case Statement must now accompany all RICO filings in the Southern District of California. *See* General Order No. 386, 92 Daily Journal D.A.R. 883 (Jan. 22, 1992).

The facts alleged in plaintiffs' Complaint fall into three categories: (1) BCCI's involvement in various criminal activities; (2) regulatory violations stemming from BCCI's secret ownership and control of several United States financial institutions;[12] and (3) the worldwide fraud perpetrated upon depositors, which ultimately ended in the financial collapse of BCCI. In response to the Court's Order,[13] plaintiffs allege that the defendants' violations of RICO caused them to lose their deposits as follows:

> (a) depositors were defrauded into placing their deposits into a criminal enterprise instead of a legitimate bank because BCCI falsely represented that it had substantial assets, profitability, a lawful operation and would be able to honor depositors' claims;
>
> (b) the ongoing existence of BCCI's criminal enterprise would not have been possible had

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[12] BCCI's financing of "fronts" or strawmen – wealthy businessmen and rulers of middle eastern states – permitted BCCI to surreptitiously acquire and control defendant First American Bank (400 branches in six states, based in Washington, D.C.); the National Bank of Georgia (the largest bank in Georgia); CenTrust Savings (20 branches in Florida); Independence Bank (11 branches, based in Encino, California; now insolvent and voluntarily dismissed by plaintiffs as a defendant in this case), and Viking Savings & Loan (Santa Monica, California).

[13] The Court ordered plaintiffs, by appending paragraphs 342, 350 and 358 of the Complaint, to "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of [RICO]." *See* Order, ¶¶ 10(L), (M), and (N) (emphasis in original).

the defendants not helped BCCI continue to operate;[14]

(c) as a continuing operation, BCCI continued to accept plaintiffs' deposits; and

(d) because of defendants' racketeering acts (which constituted the operation of BCCI), banking regulators seized BCCI on July 5, 1991, freezing depositors' funds and causing their present losses.

See Complaint, ¶¶ 342, 350, 358.

II. ANALYSIS

A. SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS

On a motion to dismiss for failure to state a claim upon which relief can be granted brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must be construed in the light most favorable to the non-moving party and all of the allegations contained in the complaint are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 23 L.Ed.2d 404, *reh'g denied*, 396 U.S. 869, 90 S. Ct. 35, 24 L.Ed.2d 123 (1969)[15] A Rule 12(b)(6) motion to dismiss should be granted only if "it appears beyond a reasonable doubt

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[14] The alleged assistance provided by the defendants includes the defendants' failure to publicly disclose BCCI's true nature and their assistance helping BCCI avoid detection by regulators.

[15] However, the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981).

that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957).

Despite these liberal pleading standards, certain types of pleadings require more particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Allegations of fraud require the pleader to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each fraudulent scheme. *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168, 117 L.Ed.2d 414 (1992); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986).

Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).[16] "[P]leading is

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[16] Rule 9(b) serves three purposes: (1) providing a defendant fair notice of the plaintiff's claim, thus enabling the defendant to prepare a defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits. *Di Vittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d. Cir. 1987) (citing *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1266 (S.D.N.Y. 1984) (Rule 9(b) "inhibits the filing of a complaint as a pretext for discovery of unknown wrongs.").

sufficient under Rule 9(b) if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' " *Id.* at 735 (citation omitted). When the alleged conduct upon which a RICO claim are fraud-type predicate offenses, Rule 9(b)'s requirement of pleading particularity applies to those allegations. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Most of the moving defendants continue to protest what they consider a dearth of allegations specifying their role in the alleged wrongdoing.[17] However, the Court is satisfied that plaintiffs' Complaint alleges with sufficient particularity the basis for each defendants' inclusion in plaintiffs' suit. Indeed, many of plaintiffs' allegations clearly and painstakingly detail defendants' involvement with BCCI.

Additionally, plaintiffs' prior use of inherently ambiguous names such as "Price Waterhouse" and "Ernst & Young" in previous pleadings is not repeated in the Complaint. Plaintiffs have complied with the Court's Order to "distinguish between the separate firms of each

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[17] For example, the public relations firm H&K complains that it is only alleged to have distributed a "fact sheet" in response to a magazine article about BCCI. *See* Complaint, ¶¶ 36, 334. Defendant Dobrich notes that he is only alleged to have been hired as an executive of Independence Bank in mid-1989, although plaintiffs' conspiracy allegations span sixteen years. *See* Complaint, Ex. 23. E&Y objects to its inclusion in charged misconduct that occurred over unspecified or broad spans of time, particularly since E&Y resigned as BCCI's auditor in 1987 and none of the alleged losses occurred until 1991.

organization . . . . " *See* Order, ¶ 10(B).[18] In addition to making distinctions between the accounting firm entities, plaintiffs also sufficiently allege an agency relationship between the different entities and are entitled to proceed on that basis as well.

The Court further concludes that plaintiffs adequately allege both conspiracy and aiding and abetting liability. Consequently, these allegations bar the independent evaluation of each defendants' isolated role in BCCI's collapse urged by the defendants because the Court cannot dismiss defendants who are sufficiently alleged to have been co-conspirators with those defendants whose predicate acts caused plaintiffs' injuries. *See Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) (all conspirators are liable for the acts of their co-conspirators).

B. PLAINTIFFS' RICO CLAIMS

1. Plaintiffs' Alleged RICO Enterprises

Plaintiffs clearly state that their alleged RICO enterprises are both identical to the pattern of racketeering activity. *See* Complaint, ¶¶ 339 (BCCI enterprise and pattern, as well as associated-in-fact enterprise and pattern,

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[18] Though the defendant accounting firms contend that plaintiffs have merely substituted "PW/UK, PW/US and PW/Luxembourg" for each previous instance of "Price Waterhouse" and "EY/US, EY/UK, and EY/Luxembourg" for each previous instance of "Ernst & Young," not all allegations contain all three entities. Plaintiffs have made some distinctions between the entities in the Complaint.

are "one in the same"), 340(b) (BCCI enterprise and association-in-fact enterprise are both "synonymous with the pattern of illegal racketeering"), 347, 348(b), 355, & 356(b). Plaintiffs' failure to allege an ascertainable structure to the RICO enterprises – separate and apart from the pattern of racketeering activity – is fatal to the allegations of these enterprises. As the Ninth Circuit noted in *United Energy Owners Comm., Inc. v. United States Energy Management Sys., Inc.*, 837 F.2d 356, 362 n.13 (9th Cir. 1988),

> [t]he *Allington* [*v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985)] court correctly noted that under [*United States v.*] *Turkette* [452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981),] every private plaintiff asserting a violation of RICO section 1962(c) must "plead an enterprise apart from the underlying pattern of racketeering activity." 619 F. Supp. at 469 (citing *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) (RICO enterprise must have "an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity."), *cert. denied*, 459 U.S. 1040, 103 S. Ct. 456, 74 L.Ed.2d 608 (1982)).

See also Sigmond v. Brown, 645 F. Supp. 243, 246 (C.D. Cal. 1986), *aff'd*, 828 F.2d 8 (9th Cir. 1987) (no separate enterprise where plaintiff had stated that the sole purpose of the enterprise was to conduct the alleged racketeering activity). Thus, plaintiffs' RICO claims fail to state a claim because the alleged enterprises have no ascertainable

structure distinct from the alleged pattern of racketeering activity.[19]

2. Plaintiffs' "Reinvestment Injury" Claim Under Section 1962(a)

Plaintiffs' section 1962(a) RICO claim is based solely on the use or investment, more accurately characterized as "reinvestment," of racketeering income by defendants in their own continuing operations. *See* Complaint, ¶ 341(f).[20] The causal nexus to plaintiffs' injury alleged by plaintiffs is that the reinvestment of racketeering income in each defendants' own operations permitted each defendant to continue to exist and engage in the illegal conduct which permitted BCCI to continue to operate without detection and solicit deposits from plaintiffs. Plaintiffs rely upon *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), to argue that each defendants' reinvestment of racketeering income in its own operation states a claim under section 1962(a). *See id.*

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[19] The Court's dismissal of substantive RICO claims constitutes a dismissal of the conspiracy alleged under section 1963(d) as well. *See Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) ("any claim under section 1962(d) based on a conspiracy to violate the provisions of 18 U.S.C. section 1962(a), (b), or (c) must necessarily fail if the substantive claims are themselves deficient").

[20] The Court's Order required plaintiffs to amend paragraph 341 of the pleading and "(i) [s]tate specifically who received income derived from the pattern of racketeering activity; (ii) [d]escribe the use or investment of such income and the enterprise in which it was used or invested; and (iii) [s]tate specifically how the victims were injured by reason of the use or investment of racketeering income." Order, ¶ 10(H).

at 1398 ("Logic dictates that a corporation, receiving income from a pattern of racketeering in which it has participated as a principal, can invest that income in its own operations.") (citing *Pennsylvania v. Derry Constr. Co.*, 617 F. Supp. 940, 943 (W.D. Pa. 1985)). The *Schreiber* court expressly held that "where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)." *Id.*

However, a question not considered by *Schreiber* is whether reinvestment can cause plaintiffs' injury in a section 1962(a) claim. Section 1964(c) of RICO provides a private right of action to persons injured "by reason of a violation of section 1962." In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985), the Supreme Court held that a plaintiff has standing to bring a RICO claim under section 1962(c) only to the extent that the conduct constituting the RICO violation caused injury to his business or property. Thus, under section 1962(c), an allegation of a pattern of racketeering activity which causes injury to plaintiff sufficiently states a cause of action.

By contrast, the gravamen of the offense under Section 1962(a) is not the underlying racketeering activity itself, but the subsequent use and investment of proceeds obtained through the racketeering activity. Thus, to state a claim under section 1964(c) for a violation of section 1962(a), plaintiffs must allege injury by the use or investment of the proceeds of racketeering activity. *See, e.g., Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert.*

denied, 493 U.S. 820, 110 S. Ct. 76, 107 L.Ed.2d 43 (1989); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991); *In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig.*, 740 F. Supp. 1460, 1469 (S.D. Cal. 1990). *Contra In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 682 F. Supp. 1073 (C.D. Cal. 1987) ("*NMEC*").[21]

Plaintiffs assert that defendants' reinvestment in their own operations perpetuated the RICO enterprise and permitted the racketeering activity to continue. *See* Complaint ¶ 341(f). This reinvestment injury theory is simply another way of stating that the predicate acts caused plaintiffs' injury and does not state an injury separately stemming from the reinvestment sufficient to state a claim under section 1962(a). *See U.S. Concord, Inc.*, 757 F. Supp. at 1060; *Williamson v. Simon & Schuster*, 735 F. Supp. 565, 568 (S.D.N.Y. 1990). For these reasons, plaintiffs' section 1962(a) claim is dismissed without leave to amend.[22]

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[21] The Ninth Circuit declined to reach this issue in *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332, 116 L.Ed.2d 272 (1991), but recognized that three of four circuit courts and a majority of district courts have required section 1962(a) plaintiffs to show injury from the use or investment of racketeering income rather than from the predicate acts alone. *Id.* at 295-96. The court also noted that Judge Tashima acknowledged the split of opinion on the issue and that his opinion in *NMEC*, 682 F. Supp. at 1073, was issued without the benefit of the appellate decisions in the Second, Third, and Tenth Circuits. *Reddy*, 912 F.2d at 296 n.6.

[22] In response to defendants' objections that they had not invested in BCCI, the Court previously observed that the complaint sufficiently alleged the use or investment of income in an

C. ARE PLAINTIFFS' CLAIMS DERIVATIVE OR DIRECT?

Defendants contend that plaintiffs lack standing because their claims are derivative of BCCI rather than direct.[23] Plaintiffs do not contest the legal principles cited by defendants; rather, plaintiffs merely insist that their claims are direct. However, plaintiffs' RICO claims are derivative of BCCI and plaintiffs lack standing to prosecute them. *See, e.g., Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979) (citing 1 Michie, *Banks and Banking* § 69 at 289-91 (1973), for the general rule that "wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank and only the bank or its receiver may sue for its recovery."); *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987) (citing 12B W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5911 (rev. perm. ed. 1984), for the general rule that "an action enforces a corporate right 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or

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enterprise under § 1962(a), "at least to the extent the enterprise is defined as the associated-in-fact enterprise consisting of the BCCI Banks and the defendants listed in the complaint." Order, ¶ 3. The Court did not thereby determine that this claim was legally sufficient in all respects; the present challenge to the legal sufficiency of the claim was not before the Court.

[23] This issue is a question of law for the Court. *See In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is individual or derivative is determined from the body of the complaint rather than from the label employed by the parties.").

distribution among individual holders.' ");[24] *In re Sunrise Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990) (a depositor's loss in an insolvent institution is a derivative claim that can only be brought on behalf of the institution by the receiver); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988) (dismissing shareholder and guarantor RICO claims because they were derivative).[25]

Cases cited by plaintiffs which permitted direct claims to proceed are all distinguishable. For example, in *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989), the court permitted suit against officers of a bankrupt corporation because the injury suffered by the RICO plaintiffs was significantly different than the injury suffered by creditors in general.[26] Similarly, in *University of*

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[24] Although a depositor is a creditor of a bank or savings and loan, "courts have relied on the principles applicable in shareholder suits in deciding whether depositors and other creditors have stated a claim that may be bought individually." *In re Sunrise Sec. Litig.*, 916 F.2d at 880 (citations omitted).

[25] The Court rejects plaintiffs' argument that RICO's lack of separate standing requirements permits recovery for indirect injury that would otherwise be characterized as derivative. Such a result would impermissibly expand federal jurisdiction over suits that are barred under other substantive legal principles. *See Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 545 (6th Cir. 1985).

[26] Indeed, the Seventh Circuit contrasted *Ashland Oil* with the result reached by the district court in *Dana Molded Prods., Inc. v. Brodner*, 58 Bankr. 576 (N.D. Ill. 1986), which barred a RICO claim as derivative because "the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money [from the bankrupt corporation] and the injuries plaintiff asserts are indistinguishable from those suffered by [the bankrupt corporation] itself." *Id.* at 579. *Dana*

Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991), plaintiffs were policyholders of an insolvent insurance company whose RICO claim against the insurer's independent auditors was direct and not derivative based on a breach of duties owed by the defendant directly to the plaintiffs, not to the insolvent insurer. *Id.* at 273. Neither of these cases support a proposition other than that already recognized by the Court: "Absent allegations of a special duty to the depositors or injury distinct from that suffered by other depositors, plaintiffs' claims fail to state a claim upon which relief can be granted." *See* Order, ¶ 2 & n.1 (citing *Sparling*, 864 F.2d at 640).[27]

Molded Products, rather than *Ashland Oil*, is more akin to the facts facing the Court here.

[27] The Court invited plaintiffs to plead the one condition that would permit them to avoid this result: a special duty to the depositors that would give them direct claims. The only other condition that would permit a direct suit – special injury not suffered by all deposits – cannot apply in these circumstances where the plaintiffs are, by definition, the putative class of all depositors. *See* Order, ¶ 2 at 2-3 & n.1.

Plaintiffs allege a "special duty" exists because all the defendants were aware of the criminal conduct of BCCI and the risk to depositors' funds, and since public disclosure of this information would have prevented depositors from placing their funds in BCCI, defendants had a duty to disclose their knowledge of BCCI's fraudulent operation. *See* Complaint, ¶¶ 1(a), 17(b) & (c), 37. Plaintiffs' conclusory statements neither change the character of plaintiffs' claims nor establish that a special duty exists. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981). Because the plaintiffs have failed to adequately plead a special duty, the Court finds that neither a special duty nor a distinct injury exists that might provide an exception to a bar of plaintiffs' derivative claims.

Plaintiffs also contend that the result reached by the Third Circuit in *Sunrise* does not apply to this case and that *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89, 78 L.Ed.2d 97 (1983), is the controlling precedent.[28] However, *Harmsen* held that a depositor who has lost funds in an insolvent institution as a result of fraud by the bank's officers states a claim for direct injury under the National Bank Act, 12 U.S.C. § 93. Not only is *Harmsen*'s holding expressly limited to actions brought under section 93 of the National Bank Act, *Harmsen*, 542 F.2d at 501-02, but the result in *Harmsen* appears inconsistent with the principles it purports to apply. *See supra*, n.28; *compare Leach v. Federal Deposit Ins. Corp.*, 860 F.2d 1266, 1271-74 (5th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S. Ct. 3186, 105 L.Ed.2d 695 (1989) (describing its result as consistent with *Harmsen*, the court held that absent special duty or distinct injury, minority shareholder's suit under *both* section 93 of the National Bank Act and RICO is derivative and cannot be maintained).

Finally, plaintiffs contend that *Sparling*'s rule barring derivative suits does not apply where fraud *by* a corporation has occurred, as opposed to fraud *on* a corporation,

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[28] The Third Circuit in *Sunrise* expressly declined to follow *Harmsen*, noting first that the result reached by the Ninth Circuit in *Harmsen* ran counter to the general rule, recognized in *Harmsen*, that shareholders may not recover directly for the injuries sustained by the bank but must demonstrate injury to themselves "as distinct from the bank." *In re Sunrise Sec. Litig.*, 916 F.2d at 886. Further, the Third Circuit observed that the result in *Harmsen* "has not been adopted by other courts." *Id.* at 886 & n.12 (citing cases).

where the corporation may sue to recover for harm done to it. Plaintiffs argue that their claims are direct and appropriate for class-action prosecution under Rule 23 of the Federal Rules of Civil Procedure because (a) unlike those cases finding claims to be derivative, no liquidator exists to prosecute BCCI claims; (b) even if such a trustee existed, claims belonging to the depositors could not be prosecuted by such a trustee; and (c) prosecution by the trustee of the depositors' claims would be subject to an *in pari delicto* defense, since BCCI was not a victim but a perpetrator.

a. **Existing Receiver.** Since the assumption of a receiver who will represent the depositors' interest underlies all of the cases holding claims to be derivative, plaintiffs contend that the cases are inapposite because no liquidator exists that will prosecute the claims of BCCI. This assertion is belied by the appointment of the Joint Provisional Liquidators by the High Court in London. Plaintiffs' assertion that the liquidators will not prosecute these claims is belied by the proposed settlement with Abu Dhabi for $ 2.2 billion and recent claims filed against Ernst & Young.

b. **Trustee's Standing.** The cases relied upon by plaintiffs, *i.e., Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988); *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678, 32 L.Ed.2d 195 (1972); *In re Lendvest Mortgage, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 73,595 at 97,812 (N.D. Cal. July 27, 1990), are inapposite and involve circumstances where plaintiffs had individual causes of action that could not be pursued by the corporation's representatives on their behalf.

c. ***In Pari Delicto* Defense.** Plaintiffs, relying upon *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L.Ed.2d 145 (1982), contend that where the corporation is the perpetrator of a fraud and benefits from it, the trustee stands in the corporation's shoes and cannot maintain a claim like the one asserted by plaintiffs here. However, the Seventh Circuit later limited the result in *Cenco* to situations where the fraud benefits the corporation. *See Schacht v. Brown*, 711 F.2d 1343, 1347-48 (7th Cir.), *cert. denied*, 464 U.S. 1002, 104 S. Ct. 508, 78 L.Ed.2d 698 (1983); *see also Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir. 1986) (in a case "indistinguishable from" *Schacht*, the court found that the liquidator had standing to sue under RICO). Here, BCCI did not benefit from the dissipation of its assets; indeed, plaintiffs' repetitively assert that BCCI is "hopelessly insolvent."[29]

D. SUBJECT MATTER JURISDICTION

Before considering the issues raised by the motions of PW/UK and ADIA to dismiss for lack of subject matter jurisdiction, the Court must first evaluate plaintiffs' claims in light of two requirements imposed by RICO: (1) proximate cause, and (2) cognizable injury.

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[29] Additionally, *in pari delicto* is an equitable defense. When application of the doctrine is not in the public interest, recovery is permitted. *In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979); *see In re Wedtech Corp.*, 88 Bankr. 619, 622 (Bankr. S.D.N.Y. 1988) ("a trustee's ability to obtain a recovery for an estate and its blameless creditors may not be denied by the prepetition wrongful conduct of the debtor").

1. RICO's Proximate Cause Requirement

Section 1964 of RICO, which provides civil remedies for violation of RICO, states that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 . . . may sue . . . " 18 U.S.C. § 1964(c) (emphasis added). Thus, the harm alleged must be "by reason of," or proximately caused by, the predicate acts. *See Holmes v. Securities Investors Protection Corp.*, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 (4th Cir. 1988) (defendant is responsible for injuries flowing from defendant's predicate act liability).

Plaintiffs state a RICO claim only to the extent that the harm they suffer is proximately caused by the predicate acts of racketeering they allege. *Holmes*, 112 S. Ct. 1311, 117 L.Ed.2d 532; *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332, 116 L.Ed.2d 272 (1991); *see also Bastian v. Petren Resources Corp.*, 892 F.2d 680, 686 (7th Cir.), *cert. denied*, 110 S. Ct. 2590, 110 L.Ed.2d 270 (1990) (unless plaintiffs are worse off as a result of defendant's acts than they would have been in the absence of defendant's acts, the causal nexus required is absent); *compare O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2620, 110 L.Ed.2d 641 (1990); *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989); *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988).

Under the circumstances, proximate cause is a question of law for the Court. *Benefiel v. Exxon Corp.*, 92 Daily Journal D.A.R. 3972, 3973 (9th Cir. Mar. 25, 1992) ("[W]here causation cannot reasonably be established under the facts alleged by a plaintiff, the question of

proximate cause is one for the court."); *see Brandenburg*, 859 F.2d at 1189 (proximate cause is a question for the court). Consequently, the Court can determine whether plaintiffs' injuries are sufficiently connected to the alleged RICO predicate acts to state a claim, considering factors such as foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection. *Id.* (citing Restatement (Second) of Torts § 548A comments a, b).

Here, plaintiffs allege twenty-eight specific predicate acts of racketeering. *See* Complaint, ¶¶ 350(f)-(ag).[30] Few of these alleged acts, however, have the requisite causal connection to the loss of plaintiffs' deposits. The harm inflicted upon plaintiffs stems solely from the looting of depositors' funds, made possible because of allegedly fraudulent statements made regarding BCCI's financial condition and falsified account information that hid BCCI's true financial condition. *See* Complaint, ¶¶ 350(h); 350(o); 350(ad); 350(af); *see also id.* ¶¶ 291(a)-(x), (aa)-(ao); ¶¶ 296-308. The alleged acquisition of control in United States banks, *id.*, ¶¶ 350(f) & (y), also proximately caused plaintiffs' loss, but only insofar as BCCI dispatched depositors' money to strawmen or frontmen for illegitimate purposes (assuming that the "infiltration of the

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[30] In the Order, the court required plaintiffs to "[a]ppend[ ] paragraph 350 of the complaint" and "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of: (i) specific predicate acts; and (ii) RICO section 1962(c) and (d). Order, ¶ 10(M) (emphasis in original).

United States banking system" resulted in a net cost to BCCI, which is not clear in the Complaint).[31]

On the other hand, the following predicate acts of racketeering, alleging committed by all of the defendants, did not proximately cause plaintiffs' losses:[32]

> (1) acquiring or controlling numerous United States banks, *id.*, ¶ 350(f) & (y), and then covering up that ownership, *id.*, ¶ 350(r);
>
> (2) financing illegal drug transactions, *id.*, ¶ 350(g);
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> (3) smuggling coffee into the United States, *id.*, ¶ 350(i);
>
> (4) assisting former heads of state Manuel Noriega and Alan Garcia to loot the national

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[31] Several alleged predicate acts involving the United States banks obviously enriched BCCI rather than depleted the depositors' funds and could not have caused depositor losses. *E.g.*, *id.*, ¶¶ 350(aa) (causing defendant First American to funnel $ 220 million to BCCI); 350(l) (causing numerous United States banks that BCCI illegally acquired or controlled to make illegal political contributions in order to gain political favor for BCCI).

[32] Plaintiffs also allege, as predicate acts of racketeering, that BCCI bribed Peruvian bankers to obtain deposits from Peru's Central Bank, *id.*, ¶ 350(w) & (ab), and bribed a former BCCI employee in London to keep him from blowing the whistle on BCCI's illegal conduct, *id.*, ¶ 350(ab). However, to qualify as RICO predicate acts, conduct must be indictable or punishable under United States laws. Since bribery under 18 U.S.C. § 201 only applies to "public officials," *see* 18 U.S.C. § 201(a)(1), a group to which Peruvian bankers and London BCCI employees do not belong, this conduct is not racketeering activity under RICO. *See Peters v. Welsh Dev. Agency*, 1991 U.S. Dist, LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

treasuries of Panama and Peru; *id.*, ¶ 350(j), (v) & (ae);

(5) laundering money and improperly pleading guilty to that charge to avoid further prosecution, *id.*, ¶ 350(k) & (ac);

(6) causing the United States banks BCCI illegally acquired or controlled to make illegal political contributions, *id.*, ¶ 350(l);

(7) assisting arms smuggling to Iran, *id.*, ¶ 350(m);

(8) delaying investigation into BCCI's United States conduct by buying political favor, *id.*, ¶ 350(n);

(9) securities fraud committed by CenTrust, *id.*, ¶ 350(p);

(10) falsifying CenTrust's financial condition and artificially inflating CenTrust's financial condition, delaying its regulatory seizure, *id.*, ¶ 350(q) & (z);

(11) illegally funneling $3 million from a telemarketing scheme out of the United States, *id.*, ¶ 350(s);

(12) financing the sale of French-manufactured aircraft owned by Argentina to third world countries, *id.*, ¶ 350(t);

(13) financing international terrorism, *id.*, ¶ 350(u);

(14) assisting in the sale of Jordanian helicopters to Guatemala, *id.*, ¶ 350(x); and

(15) BCCI's illegal acceptance of deposits in its United States agency offices, *id.*, ¶ 350(ag).[33]

Indeed, plaintiffs themselves recognize that the victims of many of these predicate acts were not the depositors but others, including BCCI, *id.*, ¶ 350(h), the government of Peru, *id.*, ¶ 350(v), the American taxpayers, *id.*, ¶ 350(z), and defendant First American. *Id.*, ¶ 350(aa).

By including allegations of BCCI's criminal activities and United States banking violations in the Complaint, plaintiffs purport to have an interest in far more conduct, engaged in by many more defendants, than those which proximately caused the loss of their deposits.[34] To include defendants' United States activity in their causal chain, plaintiffs allege that their injuries were caused by (a) acts of the defendants here in United States that helped avoid detection by United States banking regulators and permitted BCCI's illegal activities in the United States (including the solicitation of deposits) to continue; (b) the eventual discovery by United States regulators of BCCI's

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[33] The fact that BCCI accepted plaintiffs' deposits, whether that transaction is characterized as legal or illegal, will always be a necessary element of any but-for causation link but it is not the proximate cause of plaintiffs' loss. *See Brandenburg*, 859 F.2d at 1189 ("[A]s a factual matter, plaintiffs would not have lost any interest on their deposits but for having made them in the first place.").

[34] For example, though plaintiffs have sought the default of deposed Panamanian dictator Manuel Noriega, Noriega's alleged misconduct, *i.e.*, looting the national treasury of Panama, has no nexus whatsoever to plaintiffs' losses, let alone being the proximate cause of their losses.

illegal conduct in the United States banking industry; and (c) the role of United States regulators in prompting overseas regulators to close BCCI. *See* Complaint, ¶¶ 342, 350, & 358.[35] However, plaintiffs' "causal" allegations implicating the activities of the defendants in the United States and the role United States regulators played in BCCI's seizure do not comport with plaintiffs' factual description of the events leading up to the seizure. *See* Complaint, ¶ 296 at 240 (inquiries from the Bank of England led to the discovery of massive fraud at BCCI and the subsequent regulatory seizure; United States regulators were not involved).[36]

2. Plaintiffs Lack Injuries That Support RICO Claims

Injury is the *sine qua non* of recovery by plaintiffs on their RICO claims. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1104 (9th Cir. 1986), *cert. denied*, 479 U.S. 949, 107 S. Ct. 435, 93 L.Ed.2d 384 (1986) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3286, 87 L.Ed.2d 346 (1985)). Without injury, plaintiffs cannot maintain their RICO claims. *See John L. Motley Assocs., Inc. v. Rumbaugh*, 104 Bankr. 683 (E.D. Pa. 1989)

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[35] These causal allegations were specifically ordered by the Court. *See supra* n.13.

[36] Significantly, no United States representative participated in the College of Regulators, the regulatory body that undertook regulation of BCCI's activities. This substantial regulatory interest by European authorities began as early as 1988, independently of United States regulatory activities. *See* Testimony of Gerald Corrigan before the House Banking Comm. (Sept. 18, 1991) (Abu Dhabi Motion, Ex. 3).

(no standing to assert RICO claim if claim can be satisfied from bankruptcy estate because plaintiff cannot show requisite "injury"); *Banker's Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007, 109 S. Ct. 1642, 104 L.Ed.2d 158 (1989) (where plaintiffs' claims against former officers of insolvent corporation overlapped with claims asserted by its trustee in bankruptcy, plaintiffs' damages were "unrecoverable," "speculative," and "unprovable"; plaintiffs' injury was wholly dependent upon the trustee's lack of recovery); *Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (RICO claims are premature where it was uncertain whether plaintiffs would satisfy their claims from the bankruptcy estate); *L'Europeene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 118-19 (S.D.N.Y. 1988). All BCCI depositors lack the requisite injury to proceed with RICO claims at this time.[37]

Plaintiffs distinguish *Bankers Trust* and argue that it should not apply because the Second Circuit applied a "discovery of injury" accrual to a RICO cause of action and stated that "refusal to award damages as too speculative is equivalent to holding that no cause of action has

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[37] Certain putative class plaintiffs' claims may never suffer injury giving rise to a RICO claim. In the United States, BCCI assets held by the Superintendents of Banking of New York and California are being distributed to depositors. Since available assets in both states far exceed political claims and only the excess will be turned over to the foreign BCCI liquidators, no BCCI depositors who had money in United States offices on July 5, 1991 will lose their deposits. Similarly, depositors in Pakistan and Oman may not lose any of their deposits because those governments have announced their intention to insure depositor losses.

yet accrued." *Id.* at 1106 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S. Ct. 795, 806, 28 L.Ed.2d 77 (1971)). In contrast, plaintiffs contend that a RICO claim accrues in the Ninth Circuit when the plaintiff has "actual or constructive knowledge of the fraud." *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988). However, a more precise statement of the rule is that the limitations period in the Ninth Circuit begins to run " 'when the plaintiff knows or has reason to know of the *injury* which is the basis for his action.' " *Beneficial Standard Life*, 851 F.2d at 274 (citing and approving the accrual rule stated in *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984)) (emphasis added); *State Farm Mutual Auto Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (same). Accordingly, plaintiffs' distinction does not avoid the Court's application of *Bankers Trust* to their RICO claims.[38]

3. Extra-Territorial Jurisdiction

While Congress certainly has the authority to enact laws that reach conduct occurring outside the territorial boundaries of the United States, whether Congress has in fact exercised that authority is a question of statutory

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[38] Additionally, plaintiffs attempt to distinguish *John L. Motley Assocs., Banker's Trust, Barnett,* and *L'Europeene de Banque* on the grounds that, unlike the case before the Court, (1) full recovery was certain in the bankruptcy proceedings; (2) the trustees were appointed pursuant to an orderly scheme, *e.g.*, the U.S. Bankruptcy laws; and (3) rulings that plaintiffs stated no RICO injury did not end those plaintiffs' suits. These contentions are either factually incorrect or unpersuasive.

construction. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991); *Republic of Phillipines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987), *on reh'g*, 862 F.2d 1355 (9th Cir. 1988) (thefts occurring in the Phillipines "quite probably" not reached by RICO and finding jurisdiction solely on the basis of acts occurring in the United States). However, there is a strong presumption against extra-territorial application of any federal statute and unless a contrary intent appears, the statute is meant to apply only within the territorial jurisdiction of the United States. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (Title VII does not apply extra-territorially); *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 923 F.2d 678, 680-82 (9th Cir. 1991), *op. withdrawn and appeal dismissed on other grounds*, 92 Daily Journal D.A.R. 4909 (9th Cir. Apr. 10, 1992) (National Railway Labor Act does not apply extra-territorially).[39]

To determine whether foreign conduct vests the Court with subject matter jurisdiction requires the Court to undertake three separate inquiries: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal

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[39] When a court encounters activity that is predominately foreign, it must question whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L.Ed.2d 389 (1975).

behavior; and (3) the appropriateness of exercising extra-territorial jurisdiction in light of considerations of international comity and fairness. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643 (1985) (citing *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (*Timberland I*)).[40]

Assuming *arguendo* that the first two *Timberlane I* elements are met here, the Court must then determine "whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial

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[40] A motion to dismiss for lack of subject matter jurisdiction is generally treated as a Rule 12(b)(1) "speaking motion" and summary judgment treatment under Rule 56 of the Federal Rules of Civil Procedure is not required. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 987); *see McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1987); *cert. denied*, 489 U.S. 1052, 109 S. Ct. 1312, 103 L.Ed.2d 581 (1988) (a court is not restricted to the face of the pleadings when considering a Rule 12(b)(1) motion but may review any evidence that might resolve factual disputes concerning the existence of jurisdiction).

If the Court were to resolve the question of jurisdiction on either of the first two parts of the *Timberlane I* test, however, the issues might be sufficiently intertwined with the merits of the treatment. *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984). On the other hand, refusal to exercise jurisdiction under the third part of the *Timberlane I* test need not directly implicate the merits of the case and Rule 12(b)(1) dismissal would be proper when the case is dismissed on that basis. *Id.*

authority." *Timberlane I*, 549 F.2d at 613. This determination requires the Court to consider seven factors:

> (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, (3) the extent to which enforcement by either state can be expected to achieve compliance, (4) the relative significance of effects on the United States as compared with those elsewhere, (5) the extent to which there is explicit purpose to harm or affect American commerce, (6) the foreseeability of such effect, and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614; *see Vespa of Am. Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224 (N.D. Cal. 1982). Since only racketeering acts that are predominantly foreign caused plaintiffs' losses, and United States depositors will never suffer any injury because no United States depositors will be lost, the exercise of subject matter jurisdiction over this case would be improper.

a. **Degree of conflict with foreign law or policy.** This element of *Timberlane I*'s test is usually applied in antitrust cases, where foreign policies and market systems often run counter to those policies expressed in United States antitrust law. RICO, on the other hand, prohibits acts that are – for the most part – prohibited everywhere.[41] However, the prosecution of plaintiffs'

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[41] Plaintiffs' conclusion, however, that *Timberlane* is therefore inapplicable to this case does not follow. Many key provisions of RICO were patterned after the antitrust laws and are

RICO claims here has the potential to interfere with the orderly liquidation of BCCI, presently proceeding in the United Kingdom, Luxembourg, and the Cayman Islands (where BCCI's main operations existed), as well as in many of the sixty-nine countries where BCCI accepted deposits. This action certainly conflicts with those foreign proceedings.

b. **Nationality or allegiance of the parties and the locations or principal places of businesses or corporations.** Few of the one million plaintiffs deposited money in United States offices of BCCI. The defendants whose conduct principally contributed to plaintiffs' losses are all foreign. Additionally, the locations or principal places of the relevant businesses or corporations are all foreign. By including the infiltration of the United States banking system by BCCI in their RICO claim, plaintiffs confuse the true nature of their looting claim and the appearance that an abundance of relevant activity and parties exist in the United States is misleading. Plaintiffs' argument that the American banks are like subsidiaries of BCCI that weigh in favor of exercising jurisdiction here is wrong.

c. **Degree to which enforcement by either state can be expected to achieve compliance.** It would be very difficult, if not impossible, for plaintiffs to enforce any judgment that might be entered by the Court here in many of the sixty-eight other countries where BCCI

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construed by analyzing antitrust jurisprudence. Thus, the *Timberlane I* test applies to plaintiffs' RICO claims.

accepted deposits.[42] Furthermore, the possibility that the Court's decisions may not have preclusive effect outside United States boundaries, particularly after what promises to be lengthy and expensive litigation, makes the exercise of extraterritorial jurisdiction here improper.

d. **Relative significance of effects on the United States as compared with those elsewhere.** Plaintiffs contend that the criminal conduct charged against BCCI in the United States and the guilty pleas entered by BCCI here not only show the influence BCCI had in the United States, but that the guilty pleas would be admissible in plaintiffs' RICO suit and would have preclusive effect. Plaintiffs' argument is faulty because the conduct alleged in criminal cases in the United States did not cause plaintiffs' loss, and the guilty pleas were by BCCI, who is not a defendant here.

BCCI is a foreign bank with its core operations in Europe, the Middle East, and Africa. At the time it closed in July 1991, BCCI only had two agencies open in the United States. On June 30, 1991, with world-wide deposits reported at $15.969 billion, only 1/2 of one percent of those depositions were in BCCI's United States agencies. Not only are 99 1/2 percent of BCCI deposits

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[42] The Court has considered expert opinions on the enforceability of a RICO judgment in the six countries where BCCI chiefly operated – the United Kingdom, Hong Kong, Luxembourg, the Grand Cayman Islands, Bahrain, and the United Arab Emirates – as well as thirty-eight additional countries.

foreign, none of the deposits made in United States agency offices will be lost.[43]

e. **Extent to which there is explicit purpose to harm or affect American commerce and the foreseeability of such effect.** Plaintiffs contend that BCCI solicited and accepted depositors' money here in the United States through its agency offices, despite the fact that it was illegal for BCCI to do so. *See* Complaint, ¶¶ 33, 289(f). However, no justiciable [sic] injury may ever arise from those deposits allegedly made in the United States. Though plaintiffs contend that BCCI's involvement in the United States banking system affects United States commerce, this conduct did not injure plaintiffs. Similarly, the fraud allegedly perpetrated by the accounting firms and H&K in the United States, *see* Complaint, ¶¶ 28, 36, does not reflect an intended effect on United State [sic] commerce because all of plaintiffs' losses stem from their deposit in BCCI's foreign operations.

f. **Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.** Since none of the predicate acts that caused plaintiffs' injuries occurred here, the United States has very little interest in the foreign conduct of BCCI,

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[43] Even assuming that United States deposits will be returned to the depositors without any interest for the time the funds were unavailable, that interest constitutes a small percentage of the 1/2 of one percent of the total BCCI deposits made in the United States. More importantly, that lost interest is only a minuscule portion of the deposits lost outside the United States.

however egregious it may be. Construing RICO to provide a remedy to this foreign fraud would give RICO a "nearly boundless extraterritorial scope," providing "a vehicle for adventurous civil and criminal litigators with an itch to see the world." *Peters v. Welsh Dev. Agency*, 1991 U.S. Dist. LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

E. FORUM NON CONVENIENS

A party moving to dismiss on grounds of forum non conveniens must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991). The requirement of an adequate alternative forum is ordinarily satisfied when a defendant is "amenable to process" in the other jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 n.22, 70 L.Ed.2d 419, 435 n.22 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07, 67 S. Ct. 839, 842, 91 L.Ed. 1055, 1061 (1947)).

Here, not all defendants are amenable to process in the United Kingdom. One of BCCI's principal accounting firms (PW/UK), BCCI's public relations firm (H&K), and defendants Naqvi and Iqbal are all subject to U.K. jurisdiction. Defendants BofA, PW/US, and E&Y have stipulated to accede to U.K. jurisdiction. On the other hand, the Clifford Defendants, the InterRedec Defendants, the First American Defendants, and defendant Dobrich contest United Kingdom jurisdiction and are probably not subject to compelled process in the U.K.

The defendants invite the Court to distinguish between "key" defendants – subject to process in the U.K. – and those United States defendants whose conduct did not proximately cause plaintiffs' losses. However, plaintiffs' allegations of conspiracy and aiding and abetting foreclose such a distinction at this time. Thus, assuming *arguendo* that the parties are otherwise properly before the Court, defendants' motion to dismiss on forum non conveniens grounds is denied.

F. MISCELLANEOUS MATTERS

Plaintiffs initially filed their complaint in this action on August 21, 1991; plaintiffs filed a first amended complaint on September 11, 1991. Leave of Court would therefore be required for plaintiffs to add parties at this stage of the litigation. *See* Fed. R. Civ. P. 15(a); 21. Having dismissed the Complaint without leave to amend, plaintiffs' motion to add parties is moot.[44]

On a Rule 12(b)(6) motion, it would be premature for the Court to preclusively conclude that no global or worldwide entity theory is available to plaintiffs. *See Department of Econ. Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1468 n.1 (S.D.N.Y. 1988) (whether affiliated accounting firms are a single global partnership is a question of fact). The Court's ruling on this issue in the Order was based on the facts as alleged at that time and

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[44] Consequently, the motion to dismiss brought by Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., John G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff is not before the Court.

does not constitute the law of the case. Accordingly, PW/ World Firm's motion to strike all references in the Complaint to a "worldwide partnership" with the name "Price Waterhouse," based on the law of the case doctrine, is denied.

As a result of the Court's resolution of the subject matter jurisdiction question, it is unnecessary for the Court to reach the issues of sovereign immunity or personal jurisdiction raised by ADIA's motion to dismiss.

III. CONCLUSION

Though plaintiffs' allegations meet the specificity requirements of federal pleading, plaintiffs' RICO claims must be dismissed without leave to amend because plaintiffs clearly allege that no ascertainable structure exists in their RICO enterprises apart from the alleged pattern of racketeering. Additionally, plaintiffs' section 1962(a) RICO claim must be dismissed without leave to amend because no injury from the use or investment of racketeering income exists where only reinvestment is alleged.

Furthermore, plaintiffs are unable to proceed with their claims because they lack standing. Not only are plaintiffs' claims derivative of BCCI and plaintiffs cannot allege any special duty or distinct injury that might avoid this bar to their suit, but plaintiffs fail to allege an injury presently giving rise to their RICO claims because all or part of their claims may be satisfied through liquidation proceedings.

Finally, in light of the foreign conduct that proximately caused plaintiffs' losses and the negligible injuries that might possibly occur to plaintiffs as a result of BCCI's activities in the United States, the Court lacks subject matter jurisdiction under principles of international comity and fairness.

Based on the foregoing, IT IS HEREBY ORDERED that plaintiffs' Complaint is dismissed without leave to amend. The Clerk is ordered to serve a copy of this memorandum opinion on the parties forthwith.

IT IS SO ORDERED.

DATED: 5/20, 1992

/s/
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE